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II] REPORTS [1975

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Maharajan, J.*

The Official Receiver, Coimbatore .. *Appellant**

v.

Kadir Meera Hussain and others .. *Respondents.*

(A) *Civil Procedure Code* (*V of* 1908)—Res judicata—*Money decree against father—Death of father—Execution proceedings against deceased—Attachment—Insolvent son and Official Receiver brought on record as legal representatives —Petition ordered—Properties sold in auction—Petition by Official Receiver setting aside sale—Dismissal—Petition by him under Insolvency Act for declaring sale void—Petition whether barred.*

(B) *Civil Procedure Code* (*V of* 1908), *Order* 21, *rules* 22, 66 *and* 90—*Failure to take notice—Subsequent Execution Petition—Whether vitiated.*

A sale is not null and void on the ground of want of attachment. Attachment is merely a measure of protection of the decree-holder and the purchaser of the property in execution and the judgment-debtor is not entitled to question a sale on the mere ground that it has not been preceded by attachment. [*Para.* 3.]

If the Official Receiver—the son of the deceased judgment-debtor being an insolvent —failed to raise certain pleas which were available to him in an earlier application by him to set aside the judicial sale, he must be deemed to have raised them and the pleas must be deemed to have been negatived by the Courts. He would be clearly barred by constructive *res judicata* from raising again those objections. [*Para.* 3.]

The failure of the decree-holder to take out any notice under Order 21, rule 22, Civil Procedure Code, does not vitiate the subsequent execution proceedings, especially when notice had been issued to him (Official Receiver) under Order 21, rule 66 and he appeared in Court and raised contentions which were unsubstantial and even vexatious. [*Para.* 3.]

Cases referred to:—

Chandra Nath Bagchi v. *Nabadwip Chandra Dutt and others*, A.I.R. 1931 Cal. 476; *Shiyali Vengu Chetti* v. *Valjee Kanjee and Company, Madras*, (1935) M.W.N. 1303: 42 M.L.W. 943 : 69 M.L.J. 862: 159 I.C. 762 : A.I.R. 1936 Mad. 99 ; *S.R. Subramania Ayyar* v. *L.A. Krishna Aiyar*, (1926) 51 M.L.J. 172: (1925) M.W.N. 887: 92 I.C. 833: A.I.R. 1926 Mad. 211; *Mohanlal Goenka* v. *Benoy Krishna Mukherjee and others*, 1953 S.C.R. 377: 1953 S.C.A. 475: 1953 S.C.J. 130: (1953) 1 M.L.J. 449: A.I.R. 1953 S.C. 65.

Appeal against the order of the District Court, Coimbatore East at Erode dated 17th December, 1971 and made in C.M.A. No. 158 of 1970 (I.A. No. 50 of 1964 in I.P. No. 24 of 1949. Sub-Court, Erode).

R. Desikan and *K. Ramamurthy*, for Appellant.

A.K. Kumaraswami, for Respondents.

The Court delivered the following

JUDGMENT.—The Official Receiver, Coimbatore, has preferred this Civil Miscellaneous Second Appeal under the following circumstances.

2. One Nagamanickam Chettiar was adjudged an insolvent in I.P. No. 24 of

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* A.A.A.O. No. 81 of 1972.

23rd August, 1974.

1949 on the file of the Sub-Court, Coimbatore, on 27th September, 1949. On that date, the properties of the insolvent vested in the Official Receiver. Subsequently, Lakshminarayana Chettiar, the undivided father of insolvent Nagamanickam, instituted a suit against the insolvent and the Official Receiver in O.S. No. 221 of 1951 on the file of the Sub-Court, Coimbatore, for partition and separate possession of his ½ share in the joint family properties. It appears that the insolvent son had been carrying on a joint family business in the name and style of "Sri Krishna Medical House" at Dharapuram, till 22nd May, 1947. In the partition suit, a decree was granted by the Sub-Court and on appeal, the High Court modified the decree, the effect of which was that Lakshminarayana Chettiar was declared entitled to a half share in the joint family properties; but the debts of the insolvent upto 22nd May, 1947 were held to be binding on the joint family properties including the share of the father. The decree of the High Court in appeal was granted on 6th August, 1958. On 3rd January, 1959. one Janardhana Naidu instituted a suit against Lakshminarayana Chettiar, the father for the recovery of Rs. 6,739 odd on the foot of a promissory note executed by the latter on 1st February, 1956, that is to say, after the severance in status which was effected between the father and the son. Summons was served upon Lakshminarayana Chettiar and on his failing to appear in Court, to contest the suit, an *ex parte* decree was granted against him on 2nd February, 1959. About a month and a half later, that is to say, on 24th March, 1959, the judgment-debtor Lakshminarayana Chettiar died and the decree-holder Janardhana Naidu filed E.A. No. 519 of 1959 in the Sub-Court, Coimbatore, on 12th April, 1959 impleading as respondent Lakshminarayana Chettiar who was already dead and without impleading his legal representative and obtained transmission of the decree to the Erode Sub-Court. On 8th August, 1959. the decreeholder filed E.P. No. 113 of 1959 in the transferee Court for the attachment and sale of the properties of Lakshminarayana Chettiar and obtained attachment on 13th August, 1959. At the time when the execution petition was filed Lakshminarayana Chettiar, who was already dead. was shown on record as a living respondent. That continued to be the position even on the date of attachment, *i.e.*, 13th August, 1959. After the attachment was effected, the decree-holder discovered that Lakshminarayana Chettiar was dead. Thereupon, he filed two applications whereby the insolvent was added as the legal representative of the judgment-debtor on 28th September, 1959 and the Official Receiver was also impleaded as a party on 17th December, 1959. Notice was ordered to both of them and was served on both of them. The insolvent remained *ex parte*. But the Official Receiver entered appearance and filed a counter contending that the execution petition was not sustainable at law, that the debt in respect of which the decree had been obtained was provable only in insolvency, and that as the Official Receiver had not been a party to the suit, the decree was not binding upon him and could not be executed against the estate of the insolvent. Be it noted that at that time the Official Receiver did not raise any objection on the ground that the attachment of the property was itself effected after the death of the judgment-debtor and before his legal representatives were impleaded in the execution petition. All the objections of the Official Receiver were overruled by the Erode Sub-Court as per the order dated 9th March, 1960 (*Vide* Exhibit A-19). Against this order, the Official Receiver preferred an appeal to the District Court of Coimbatore, and the appeal was dismissed with costs as per Exhibit A-20. Against that order, a Civil Miscellaneous Second Appeal was filed in the High Court and this Court dismissed it with costs (*Vide* Exhibit A-22). Subsequently, execution was proceeded with in the presence of the Official Receiver and with the insolvent on record as respondents and the properties were sold under the hammer of Court on 16th June, 1960 and purchased by Khadir Meera Hussain, the first respondent in this appeal. It may be noted that he is a third-party-auction-purchaser. Strangely enough, the Official Receiver started another round of proceedings in impeachment of the sale. He filed an application under Order 21, rule 90, Civil Procedure Code, for setting aside the judicial sale

in E.A.No. 404 of 1950 on the file of the Sub-Court, Erode. The objections taken were that the Court-auction was vitiated by material irregularity and fraud in the publication and conduct of the sale, that there was in fact, no proclamation of sale at or near the place of the property, that no sale notice had been issued and that in consequence the property had been sold at an under-value. This was opposed by the decree-holder and the auction-purchaser and after an elaborate inquiry, this petition was dismissed on 31st March, 1965 as per Exhibit B-1. Against this order again, the Official Receiver, Coimbatore, preferred an appeal to the District Judge of Coimbatore, who by his judgment dated 11th July, 1966, dismissed the appeal with costs (Exhibit B-2). Thereafter, the Official Receiver started a third round of litigation by filing a petition under section 4 of the Provincial Insolvency Act in the Insolvency Court praying for a declaration of his title to the properties that had been sold away in Court-auction after declaring that the decree in O.S. No. 1 of 1959 on the file of the Sub-Court, Coimbatore, was vitiated by fraud and therefore void and that the execution sale in favour of the said void decree was null and void. Curiously enough, this petition was allowed by the Subordinate Judge, Erode. Against the order of the Subordinate Judge C.M.A. No. 158 of 1970 was filed before the District Judge, Coimbatore East, who allowed the appeal but without costs. It is against this judgment that the present Civil Miscellaneous Second Appeal has been preferred.

3. The first question that arises for determination in this appeal is whether the contentions of the Official Receiver are not barred by the principle of *res judicata*. Be it noted that in E.P. No. 113 of 1959, the Official Receiver appeared in Court and raised all conceivable objections to the executability of the decree and the saleability of the property and all these objections were overruled by three Courts. After the sale was effected he applied for setting aside the sale on the ground that there was fraud and material irregularity in the publication and conduct of the sale. These objections have also been overruled by two Courts (*Vide* Exhibits B-1 and B-2). Thereupon, the Official Receiver changed the venue of his proceedings from the ordinary civil Court to the Insolvency Court by filing I.A. No. 50 of 1964 under section 4 of the Provincial Insolvency Act just for the purpose of reiterating the very objections which he had raised before the ordinary civil Court and which had been overruled by as many as five Courts. His excuse for resorting to the petition under section 4 of the Insolvency Act is that he could not either in the execution proceedings while the execution petition was pending, or in the proceedings to set aside the judicial sale raise the objections which he has raised for the first time in this petition. The objection is that at the time when the Execution Petition was filed it was filed against a dead person without his legal representative (insolvent) or the Official Receiver being impleaded as party to the execution petition and that at the time when the properties were attached there was only a dead judgment-debtor on record without anybody representing his estate. This is a contention which the Official Receiver says he could not raise in the prior two proceedings because he was unaware of the fact that even before the transmission of the decree from the Coimbatore Sub-Court to the Erode Sub-Court the judgment-debtor Lakshminarayana Chettiar had died. Now that the Official Receiver has become wise about the date of death and about the alleged invalidity of the execution petition filed as well as about the invalidity of the attachment effected he has come forward with a petition under section 4 of the Insolvency Act. Before dealing with the question whether it is open to him to raise this contention, I may say that the failure of the decree-holder in E.P. No. 113 of 1959 to take out notice under Order 21, rule 22, Civil Procedure Code, does not vitiate the subsequent execution proceedings especially in view of the admitted fact that notice was issued to him under Order 21, rule 66, Civil Procedure Code, and he appeared in Court and raised contentions which in my view, were unsubstantial and even vexatious. In *Chandra Nath Bagchi* v. *Nabadwip Chandra Dutt and others*[1] a Division Bench has held that :

" Where a notice under rule 22 has not been issued and the party who is enti-

1. A.I.R. 1931 Cal. 476.

tled to notice does not in substance get notice and is not given or does not take an opportunity to object to the execution of the decree, the sale which follows will be without jurisdiction in the sense that, even if the sale is to a stranger, the sale will not be binding or valid. But where the parties have been litigating actively with each other upon the question whether an execution should proceed and how it should proceed for a period of more than two years on a notice under Order 21, rule 66, it would be merely piling unreason upon technicality to hold that it is open to the judgment-debtors to object to the jurisdiction of the Court because they have not got a formal notice to do something, namely to dispute the execution of the decree which in point of fact they were busy disputing in all the Courts for the best part of two years."

In fact, in this case, the Official Receiver has been disputing the decree and the execution proceedings for over a decade. The above authority has been acted upon by a Division Bench of this Court in *Shiyali Vengu Chetti* v. *Valjee Kanjee & Company, Madras*[1]. Further, even assuming the sale has been held without any attachment, the sale could not be void as has been held in *S.R. Subramania Aiyar* v. *L.A. Krishna Aiyar*[2]. The sale is not null and void on the ground of want of attachment. Attachment is merely a measure of protection of the decree-holder and the purchasers of the property and the judgment-debtor is not entitled to question a sale on the mere ground that it has not been preceded by attachment. It would thus be found that the ground newly discovered by the Official Receiver is untenable. Even if it were tenable, he would be clearly barred by constructive *res judicata* from raising those objections. Those are objections which he might and ought to have raised both in E.P. No. 113 of 1959 and in E.A. No. 404 of 1950 which he filed for setting aside the judicial sale. If he failed to raise these pleas he must be deemed to have raised them and the pleas must be deemed to have been negatived by the Courts.

1. (1935) M.W.N. 1303 : 42 M.L.W. 943 : 69 M.L.J. 862 : 159 I.C. 762 : A.I.R. 1936 Mad. 99.

2. (1926) 51 M.L.J. 172 : (1925) M.W.N. 887 : 62 I.C. 833 : A.I.R. 1926 Mad. 211.

4. In *Mohanlal Goenka* v. *Benoy Krishna Mukherjee and others*[1], it has been held as follows :

> "As the judgment debtor did not raise the present objection either when the decree-holder made a second application for execution in November, 1932 or when the decree-holder applied to the High Court in March, 1933 or in the proceedings for setting aside the sales in 1936, or in the appeals therefrom though several other objections were raised, he was precluded from raising the plea at a later stage on the principle of constructive *res judicata*. Their Lordships further held that even though the question related to the jurisdiction of the Court, it would not prevent the operation of the rule of *res judicata*."

5. I have, therefore, little hesitation in holding that the new found plea of the Official Receiver is doubly barred by *res judicata* and the first appellate Court has rightly held against him. There is little substance in this appeal which will, therefore, stand dismissed with costs throughout.

R.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*B.S. Somasundaram, J.*

A. Rafeeq Ahmed Sahib .. *Petitioner**

v.

Istiaq Ahmed .. *Respondent.*

(A) *Criminal Procedure Code* (*V of* 1898), *section* 195 (1) *and* (2)—*Complaint by tenant against landlord—Allegation of forgery and making use of forged document in rent control proceedings—No complaint by Court—Proceedings whether sustainable.*

(B) "*Rent Controller*"—*Whether a* "*Court*".

Proceedings are barred by section 195(1) of the Criminal Procedure Code, 1898 where

1. 1953 S.C.R. 377 : 1953 S.C.A. 475 : 1953 S.C.J. 130 : (1953) 1 M.L.J. 449 : A.I.R. 1953 S.C. 65.

* C.M.P. No. 2596 of 1973.

16th *September*, 1974.

no complaint is made by the concerned Court. The bar would apply only in respect of a document forged subsequent to the initiation of proceedings in any Court. If the document was forged much prior to the initiation of proceedings it will be an offence under section 467, Indian Penal Code, and this can be tried in the absence of a complaint by the Court unless it is shown by evidence that the document was forged by a party to the earlier proceedings in his character as such party, in other words, after the suit had been instituted. [*Para.* 4.]

Section 195 (2), Criminal Procedure Code, specifically excludes a Registrar or a Sub-Registrar under the Indian Registration Act from the purview of Court. It is thus evident from the language of this sub-section that but for exclusion expressly made, a Registrar or a Sub-Registrar under the Indian Registration Act would legitimately be considered to have been included in the term "Court". In view of the legislative intention clearly expressed in the sub-section there is every reason to include the Rent Controller and the Appellate Authority within the definition of the term "Court" as given in section 195 (2) as these tribunals have far greater trappings of a Court than a Registrar or Sub-Registrar under the Indian Registration Act. [*Para.* 6.]

Cases referred to :—

Patel Laljibhai v. *State of Gujarat*, A.I.R. 1971 S.C. 1935 ; *Sankar* v. *Buvanambal Ammal*, (1971) 1 M.L.J. 230 : 84 L.W. 134 : A.I.R. 1971 Mad. 368 ; *The State* v. *Bhagabati Prasad*, I.L.R. (1951) 2 Cal. 182; *Vidya Devi* v. *Firm Madan Lal*, A.I.R. 1971 Punj. & Har. 150.

Petition praying that in the circumstances stated therein the High Court will be pleased to call for the records in C.C. No. 5606 of 1973 pending before the VIII Presidency Magistrate, George Town, Madras and quash the Complaint.

A.C. Anantharama for *Habibullah Badsha*, *E. S. Govindan* and *A.S. Chandrasekaran*, for Petitioner.

Mohammed Rajinuddin Madani, for Respondent.

The Court made the following

ORDER.—This is an application for quashing the proceedings pending against the petitioner in C. C. No. 5606 of 1973 in the Court of the VIII Presidency Magistrate, G. T., Madras. That case is a case for the alleged offences of forgery and making use of a forged document in certain rent control proceedings and the respondent herein (tenant) is the complainant therein. His case is that on 7th March, 1968, the petitioner-landlord obtained his signature in a blank sheet of paper, that subsequently he brought into existence the recitals in that sheet to show as though the respondent was in arrears of rent to the tune of Rs. 1,563-77 and subsequently made use of this document in the proceedings for eviction. The petitioner contends that section 195 (1) of the Code of Criminal Procedure is a bar for the present proceedings because the document in question, even according to the respondent, was used in proceedings in Court and that it is that Court which should come forward with a complaint for offences of forgery etc.

2. Therefore, the short point for determination is, whether the proceedings are sustainable without a complaint by Court as contemplated by section 195 (1) of the Code of Criminal Procedure.

3. Exhibit P-10 is the letter. The respondent admits his signature in it. He contends that the petitioner-landlord obtained his signature in a blank sheet stating that it was for getting an acknowledgment of the arrears for electricity charges. This document recites that the respondent was in arrears of rent to the tune of Rs. 1,563.77. This was put to the respondent when he was in the witness box in the proceedings before the Rent Controller. The learned Rent Controller held that Exhibit P-10 is a genuine document executed by the respondent and this document established clearly that the respondent was in huge arrears of rent and that, therefore, he was liable to be evicted. With this finding, he ordered eviction. This was on 24th September, 1970. The respondent tenant preferred an appeal to the appellate authority (IV Judge,

Court of Small Causes, Madras). The appellate authority set aside the order of eviction and observed that Exhibit P-10 cannot be taken as a genuine document. This was on 15th September, 1971. The present complaint was filed by the respondent on 30th March, 1973, nearly 1½ years after the judgment of the appellate authority. On the question as to whether Exhibit P-10 is a forged document or a genuine one, except the evidence of the complainant and the respondent, there is no other evidence in the case to show either way. It is a case of oath against oath. The Rent Controller has held that Exhibit P-10 is a genuine document and the appellate authority has held that it is otherwise. Whether in such circumstances, the complainant could satisfactorily prove his case of forgery beyond doubt is itself doubtful matter. But this is a question germane to the issues now arising for consideration in this case. The fact remains that the respondent-complainant had come forward with the present complaint of forgery 1½ years after the finding given by the appellate Court. The fact that he delayed for such a long time is yet another circumstance, which will have to be taken into account for assessing the genuineness or otherwise of the document Exhibit P-10. We are not concerned at this stage with that aspect of the matter also.

4. The learned Counsel appearing for the respondent relies on the decision in *Patel Laljibhai* v. *State of Gujarat*[1], and contends that a complaint by Court under section 195 (1) of the Code of Criminal Procedure, is not necessary because this document Exhibit P-10 came into existence much prior to the initiation of the proceedings by the landlord in Court. In the decision cited above, it was held :

> "The offences about which the Court alone, to the exclusion of the aggrieved private parties is clothed with the right to complain may, therefore, be appropriately considered to be only those offences committed by a party to a proceeding in that Court, the commission of which has a reasonably close nexus with the proceedings in that Court so that it can, without embarking upon a completely independent and fresh inquiry, satisfactorily consider by reference principally to its records the expediency of prosecuting the delinquent party.
>
> The purpose and object of the Legislature in creating the bar against cognizance of private complaints in regard to the offences mentioned in section 195 (1) (*b*) and (*c*) is both to save the accused person from vexatious or baseless prosecutions spited by feelings of vindictiveness on the part of the private complainants to harass their opponents and also to avoid confusion which is likely to arise on account of conflicts between findings of the Courts in which forged documents are produced or false evidence is led and the conclusions of the criminal Courts dealing with the private complaint. It is for this reason that the Legislature has entrusted the Court whose proceedings had been the target of the offence of perjury to consider the expediency in the larger public interest, of a criminal trial of the guilty party."

This bar would apply only in respect of documents forged subsequent to the initiation of proceedings in any Court. If the document was forged much prior to the initiation of proceedings, it will be an offence under section 467, Cr. P. Code, and this can be tried in the absence of a complaint by the Court unless it is shown by evidence that the document was forged by a party to the earlier proceedings in his character as such party, in other words after the suit had been instituted.

5. The respondent in paragraph 3 of his grounds of appeal filed by him in the appellate Court in the rent control matter averred that this document Exhibit P-10 was prepared at a later stage by the petitioner or by someone interested in him, that is, after the initiation of the eviction proceedings, long after 9th August, 1968. Thus, his version is that Exhibit P-10 did not come into existence on the date, which it bears, but on a date subsequent to 9th August, 1968, that is, during the pendency of the eviction proceedings. When that is the

1. A.I.R. 1971 S.C. 1935.

case, the decision in *Patel Laljibhai* v. *State of Gujarat*[1], will not apply. It follows that the complaint by Court is necessary as contended by the petitioner.

6. The learned Counsel for the respondent contends that the Rent Controller is not a Court and as such section 195 (1), Criminal Procedure Code, cannot come into operation and for this position he relies upon the decision in *Sankar* v. *Buvanambal Ammal*[2]. In that case there was no appointment of the Additional District Munsif as a Controller. The case was transferred by the Principal District Munsif, who alone was appointed as such, to the file of the Additional District Munsif, as per the directions of the High Court. The latter alone was invested with the powers of a Controller. Under section 2 (3) of the Madras Buildings (Lease and Rent Control) Act, 'Controller' is defined as a person appointed to perform the function of a Controller under the Act. In that case, it was contended that under section 4 (*a*) of the Civil Courts Act where the Court of the District Munsif has been entrusted with powers under the provisions of that Act or any other Act, those powers could be exercised also by the Additional District Munsifs. The Bench held that the simple answer to this is that the Controller is not a Court and the investiture of power under section 2 (3) of the Act is *persona designata*, that is to say, the Principal or any other District Munsif named specifically, and not on the Court, as such, of the District Munsif, and that when the investiture by the notification is specifically on the Principal District Munsif, it cannot be said that because in other respects the Additional District Munsif has the same powers as the District Munsif, the former could also function as a Controller. The Bench further observed in paragraph 5 as below:

> "It is true that the Additional District Munsif will have, as a Court, the same powers as the District Munsif. But by equation of the powers there can be no identification of the offices they hold."

This is all that the Bench has said in the above decision. Clause 2 of section 195, Criminal Procedure Code, states the term 'Court' in clauses (*b*) and (*c*) of sub-section (i) includes a Civil, Revenue, or Criminal Court, but does not include a Registrar or Sub-Registrar under the Indian Registration Act. The Court as per section 3 of the Indian Evidence Act includes all Judges and Magistrates and all persons except arbitrators legally authorised to take evidence. In *The State* v. *Bhagabati Prasad*[1], it has been held that the Rent Controller, who receives evidence for the purpose of deciding an application for standardisation of rent, is a court within the meaning of section 195 of the Code of Criminal Procedure, whether or not he is a Court when he decides only on personal enquiry. It was further held that a complaint by a Rent Controller is necessary before a person can be prosecuted under section 471 of the Indian Penal Code for using as genuine a forged receipt in a proceeding for standardisation of rent before him when he received evidence to decide the matter. The decision in *Vidya Devi* v. *Firm Madan Lal*[2], points out that, what distinguishes a Court from a quasi-judicial tribunal is that it is charged with a duty to decide disputes in a judicial manner and declare the rights of parties in a definitive judgment. It was held that to decide in a judicial manner involves that the parties are entitled as a matter of right to be heard in support of their claim and to adduce evidence in proof of it, and that when a question, arises as to whether an authority created by an Act is a Court as distinguished from a quasi-judicial tribunal, what has to be decided is whether having regard to the provisions of the Act it possesses all the attributes of a Court. Section 195 (2) specifically excludes a Registrar or Sub-Registrar under the Indian Registration Act from the purview of Court. It is, thus, evident from the language of this sub-section that but for exclusion expressly made, a Registrar or a Sub-Registrar under the Indian Registration Act, would legitimately be considered to have been included in the term 'Court.'

1. A.I.R. 1971 S.C. 1935.
2. (1971) 1 M.L.J. 230 : 84 L.W. 134 : A.I.R. 1971 Mad. 368.

1. I.L.R. (1951) 2 Cal. 182.
2. A.I.R. 1971 Punj. & Har. 150.

In view of the legislative intention clearly expressed in the sub-section there is every reason to include the Rent Controller and the Appellate authority within the definition of the term 'Court' as given in section 195 (2), Criminal Procedure Code, as these tribunals have far greater trappings of a Court than a Registrar or a Sub-Registrar under the Indian Registration Act. Thus, section 195 (1), Criminal Procedure Code, is a bar to the present proceedings. There must be a complaint by the Court. The present proceedings are, therefore, quashed. The respondent will be at liberty to move the concerned Court under section 195 (1), Criminal Procedure Code. The Criminal miscellaneous petition is allowed.

R.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*P. R. Gokulakrishnan, J.*

Doraiswami Pillai (died) and others .. *Appellants**

v.

S.K. Munuswami Mudaliar and others .. *Respondents.*

Benami—Tests of.

Courts are usually guided in determining whether a transaction is benami or not by (1) the source from which the purchase money came ; (2) the nature and possession of the property, after the purchase ; (3) motive, if any, for giving the transaction a benami colour; (4) the position of the parties and the relationship, if any, between the claimant and the alleged benamidar; (5) the custody of the title-deeds after the sale; and (6) the conduct of the parties concerned in dealing with the property after the sale. [*Para* 15]

To find out whether a transaction is benami or not, all the various circumstances have to be cumulatively taken into consideration instead of relying on one or two of the circumstances alone. Whether a particular circumstance is the important one, has to depend upon the facts and circumstances of a given case. [*Paras.* 18, 19.]

Cases referred to :—

Thangavi Ammal v. *Gurunatha Goundan*, (1963) 2 M.L.J. 151 ; *Jaydayal Podder* v. *Bibi Hazra*, (1974) 2 S.C.J. 517 : A.I.R. 1974 S.C. 171; *A.S. Battacharjee* v. *A. K. Roy*, (1961) 65 C.W.N. 1175; *Krishna* v. *Ganapathi*, *A.I.R.* 1955 *Mad.* 648.

Appeal against the decree of the Court of the Additional Subordinate Judge, Chingleput, dated 25th January, 1971 in Appeal Suit No. 19 of 1967, preferred against the decree of the Court of the District Munsif of Trivellore in Original Suit No. 108 of 1963.

A. Sundaram Iyer, for Appellants.

M.S. Venkatarama Iyer, for Respondents.

The Court delivered the following :

JUDGMENT :—Defendants 1 to 3 and 5 to 7 are the appellants. The suit was for declaration, possession and damages.

2. The dispute in the suit related to a vacant site measuring 45 x 285 feet, comprised in S.No.42/4-A of Poovalambedu village. One Shanmugham Pillai purchased the suit site from one Alagusundara Mudali for Rs. 50/- under a registered sale deed dated 5th February, 1914. As Shanmugham Pillai was a permanent resident of Madras, the suit site was under the management of the first defendant, his wife's step-brother. Defendants 2 and 3 are the undivided sons of the first defendant. Defendants 4 and 5 were permitted to put up a hut in a portion of the suit site. On 11th July, 1962, the plaintiff purchased the suit site from the grandsons of Shanmugham Pillai for Rs. 750/- under a registered sale deed. Since the enemies of the plaintiff have set up the sixth defendant to put up resistance to the plaintiff the plaintiff issued a notice to the defendants on 21st December, 1962, to which the latter sent a reply on 14th January, 1963 with false allegations. Defendants 7 to 10 are the heirs and legal representatives of the fourth defendant who died pending the suit. According to the plaintiff, the defendants are liable to deliver possession of the suit property to

* S.A. No. 1199 of 1971. *27th September,* 1974.

him and to pay damages for the use and occupation of the property, from 11th July, 1962 at the rate of Rs. 6 per mensem. On these allegations, the plaintiff came forward with the suit for declaration of his title to the suit property, for possession of the same after removing the huts put up by defendants 4 and 5 therein and for recovery of Rs. 48 towards damages for use and occupation from 11th July, 1962 till the date of plaint.

3. Defendants 8 and 9 remained *ex parte*. The other defendants filed three sets of written statement.

4. The first defendant claimed the suit property as his ancestral property. According to him, his father purchased the same in the name of Shanmugham Pillai, in whom he had great confidence. He took the sale deed in the name of Shanmugham so that his sons through the first wife might not claim the same as joint family property. He paid the consideration of Rs.50 and took possession of the property. Ever since then, he was in possession of the suit property and also the title-deed. Shanmugham Pillai never claimed any right in the suit property. In the family partition, the suit property fell to the share of defendants 1 to 3. The first defendant sold an extent of 45 x 60 feet of the suit property to the sixth defendant about 22 years ago for Rs. 400, and ever since then the sixth defendant has been in possession and enjoyment of that portion by putting up a fence and stocking hay-ricks. The first defendant permitted defendants 4 and 5 to occupy portions of the suit property about twenty-five years ago. The first defendant was never managing the suit property on behalf of Shanmugham Pillai or his heirs. He further contended that he has been using the rest of the portion of threshing-floor. He therefore prayed for a dismissal of the suit.

5. Defendants 2 to 6 filed a common written statement adopting the written statement of the first defendant and further contended that the plaintiff's vendors had no title to the suit property and that they were never in possession of the same at any time within twelve years before suit. They further contended that the suit property is the ancestral property of defendants 1 to 3 and that it has always been in their possession and enjoyment by virtue of a partition, which took place about twenty-five years ago. The first defendant put up a kiln in the suit site more than fifteen years ago and so defendants 1 to 3 are entitled to it. The first defendant sold an extent of 45 x 60 feet of the suit site to the sixth defendant for Rs. 400 about twenty years ago and ever since he has been in exclusive possession of that portion by putting up a fence and stocking hay-ricks. Defendants 4 and 5 are in possession of a portion of the suit site for the past fifteen years and twenty-five years respectively and therefore the plaintiff has no right to the suit site.

6. Defendants 7 to 10 were brought on record as the legal representatives of the deceased fourth defendant who died, pending suit, and they filed a written statement adopting the written statements filed by defendants 1 to 6.

7. The trial Court, on the issues framed in the suit, held that the sale in favour of the plaintiff is not valid, that he and his predecessors-in-title have not been in possession of the suit property within twelve years before suit, that defendants 4 and 5 were in permissive possession of the suit property only under the first defendant, that the suit property was purchased by the first defendant's father benami in the name of Shanmugham Pillai, that the sixth defendant has not purchased any portion of the suit property from the first defendant, that the suit site property did not fall to the share of defendants 1 to 3 in the family partition, as set up by them and that the plaintiff is not entitled to the reliefs prayed for. The trial Court thus dismissed the suit.

8. Aggrieved by the judgment and decree of the trial Court, the plaintiff filed an appeal to the Sub Court at Chingleput. The lower appellate Court after elaborately discussing the evidence on record, found that the case of benami set up by the defendants is not true, that Shanmugham Pillai derived valid title under Exhibit B-1 and that therefore his heirs, the vendors of the plaintiff, had valid title to convey under Exhibit A-1.

The lower appellate Court also found that the suit property has not been purchased benami by the first defendant's father in the name of Shanmugham Pillai and that the first defendant and the persons claiming from him have not perfected title to the suit property by adverse possession. In view of the above findings, the lower appellate Court granted the declaration of title and possession, asked for by the plaintiff in the suit. As regards damages, the lower Court left it open to be decided under Order 21, rule 12, Civil Procedure Code. In the result, the appeal was allowed and the suit was decreed as prayed for.

9. Aggrieved by the judgment and decree of the lower appellate Court, the defendants have preferred the above second appeal.

10. The only question that has to be decided in the second appeal is as to whether the sale in favour of Shanmugham Pillai is benami for the benefit of the first defendant's family, or not. If the case of benami is proved by the first defendant and the other defendants who support his case, the plaintiff cannot derive any title under Exhibit A-1 sale by the grandsons of Shanmugham. We have to see whether the benami nature of Exhibit A-1 set up by the defendants is true.

11. Thiru A. Sundaram Ayyar, the learned counsel appearing for the appellants-defendants, submitted that this Court has ample power to interfere, at the second appellate stage, under section 100, Civil Procedure Code, when the question involved is one of a right construction of a document of title, or of a document which forms the foundation of the suit, or of a legal inference from a document; in such cases, the question is one of law and as such the second appellate Court can interfere with the finding on the same. According to Thiru A. Sundaram Ayyar, the inference has to be drawn from the proved facts. Thiru A. Sundaram Ayyar also cited the decision in *Thangavi Ammal* v. *Gurunatha Goundan*[1], where Ramakrishnan J., after discussing about the ingredient to constitute a benami transaction, held that his discussion was sufficient to show that:—

> "The judgment of the lower appellate Court involves an error of law in giving a decision about the benami title after basing its finding only on one aspect of the matter exclusively, and ignoring the fact that all the other tests usually applied for that purpose are in favour of the plaintiff and against the first defendant."

On such a finding, the learned Judge set aside the finding of the lower appellate Court.

12. Thiru A. Sundaram Ayyar further elaborately argued with regard to the various aspects and ingredients necessary for a 'benami transaction' and submitted that it has been clearly proved that the transaction under Exhibit A-1 is a benami transaction, and that Shanmugham Pillai cannot be held as the real owner of the suit property.

13. Thiru M.S. Venkataramier, the learned counsel for the respondent-plaintiff, submitted that there cannot be any hard and fast rule as to which ingredient is necessary to constitute a 'benami transaction' and such thing will differ from case to case, depending on facts and circumstances of each case. According to Thiru M.S. Venkataramier, the lower appellate Court has properly drawn the inference from the proved facts and there is absolutely no question of law as such or miscarriage of justice, for this Court to interfere with the finding arrived at by the lower appellate Court.

14. I have been taken though the judgments of the Courts below and also the evidence on record.

15. In *Jayadayal Podder* v. *Bibi Hazra*[1], it has been held :—

> "It is well settled that the burden of proving that a particular sale is benami and the apparent purchaser is not the real owner, always rests on the person asserting it to be so. This burden has to be strictly discharged by adducing legal evidence of a definite

1. (1963) 2 M.L.J. 151.

1. (1974) 2 S.C.J. 517 : A.I.R. 1974 S.C. 171.

character which would either directly prove the fact of benami or establish circumstances unerringly and reasonably raising an inference of that fact. The essence of a benami is the intention on the party or parties concerned ; and not unoften such intention is shrouded in a thick veil which cannot be easily pierced through. But such difficulties do not relieve the person asserting the transaction to be benami of any part of the serious onus that rests on him ; nor justify the acceptance of mere conjectures or surmises as a substitute for proof. Though the question, whether a particular sale is benami or not, is largely one of fact, and for determining this question no absolute formulse or acid test, uniformally applicable in all situations, can be laid down, yet in weighing the probabilities and for gathering the relevant indicia, the Courts are usually guided by these circumstances : (1) the source from which the purchase money came ; (2) the nature and possession of the property, after the purchase ; (3) motive if any, for giving the transaction a benami colour ; (4) the position of the parties and the relationship, if any, between the claimant and the alleged benamidar ; (5) the custody of the title-deeds after the sale and (6) the conduct of the parties concerned in dealing with the property after the sale.

The above indicia are not exhaustive and their efficacy varies according to the facts of each case. Nevertheless, No. 1, *viz*., the source whence the purchase money came, is by far the most important test for determining whether the sale standing in the name of one person, is in reality for the benefit of another."

16. Thiru A. Sundaram Ayyar, learned counsel appearing for the appellants, also cited the decision in *A. S. Battacharjee*[1] v. *A. K. Roy*[1], for the proposition that motive is one of the elements usually taken into consideration in deciding the question of benami, but it is not such an element that its presence or absence would necessarily be decisive of the matter.

1. (1961) 65 C.W.N. 1175.

17. In *Krishna* v. *Ganapathi*[1], a Bench of this Court has held :

" In order to find out whether a transaction is benami one must have regard to the following facts, *viz*., (*i*) the source from which the purchase money was derived ; (*ii*) the possession of the property, i.e., (*a*) the party in possession, and the nature and character of his possession ; (*b*) whether possession was taken after the alleged gift or purchase—if not taken, why not; (iii) the petition of the parties and their relation to one another, (iv) the circumstances, pecuniary or otherwise, of the alleged transfer, (v) his motive in making the alleged transfer ; (vi) the custody and production of the title deed ; and (vii) the previous and subsequent conduct of the parties. But it must be noted that each of these circumstances taken by itself is of no particular value and affords no conclusive proof of the intention to transfer the ownership from one person to the other. But a combination of some or all of them and a proper weighing and appreciation of their value would go a great way towards indicating whether the ownership has been really transferred, or where the real title lies."

18. Thus, it is clear that in order to find whether a transaction is benami or not all the various circumstances have to be cumulatively taken into consideration instead of relying on one or two of the circumstances necessary in holding that a transaction is benami.

19. The lower appellate Court, after properly discussing the evidence and the circumstances of the case and also adverting to the fact that Exhibit B-1 was written by Krishnaswami, one of the sons of the first wife of the first defendant, came to the conclusion that the motive alleged for the benami transaction is not true. The lower appellate Court has also rightly observed that the fact that the suit site was the subject-matter of the partition, is a circumstance against the

1. A.I.R. 1955 Mad. 648.

case of the first defendant. As regards possession the lower appellate Court elaborately discussed the close relationship between the parties , *i.e.*, the first defendant and Shanmugham Pillai and the fact that Shanmugham Pillai was permanently residing at Madras, and found that possession by the first defendant and his father cannot be considered as a circumstance against the case put forward by the plaintiff. Even as regards the possession of the original title deeds with the first defendant's family, the lower appellate Court discussed the same and has come to the conclusion that mere possession of the title deeds, considering the close relationship between the parties and the management of the suit property by the first defendant and his father, will not in any way advance the case of benami set up by the first defendant. On the question of consideration for the sale, the lower appellate Court on a discussion of the evidence of D. W. 1 that his father paid the consideration, cannot be accepted, as true, as it is interested and the same is not supported by independent evidence. The main points relied on by the first defendant were that the suit property was not included in the will executed by Shanmugham Pillai and that the suit property was made the subject-matter of the partition in the first defendant's family. The lower appellate Court has rightly observed that no particular importance can be attached to the omission of this property in the Will of Shanmugham Pillai but that, on the other hand, the inclusion of the property in the deed of partition in the first defendant's family falsifies the case of the first defendant that this property was intended to benefit the second wife's son of the first defendant's father. Thus, the lower appellate Court, after properly discussing all the evidence on record and the attendant circumstances of the case, drew the inference that the case of benami set up by the first defendant is not true. In *Jayadayal Podder* v. *Bibi Hazra*[1], already noticed, the Supreme Court, while enumerating the indicia for the purpose of finding out whether a certain transaction is benami, also pointed out that those indicia are not exhaustive and their efficacy varies according to the facts of each case. Thus, it is clear whether a particular circumstance is the important one, has to depend upon the facts and circumstances of a given case. There cannot be any generalised theory as to whether one particular circumstance is important or not. Taking into consideration the cumulative effect of all the facts and circumstances of the present case, the lower appellate Court has come to the conclusion that Exhibit B-1 is not a benami transaction, that Shanmugham Pillai got the right in the suit property under the said purchase and that the plaintiff has validly purchased the right, title and interest from the heirs of Shanmugham Pillai. I am in complete agreement with the findings arrived at by the lower appellate Court. There is absolutely no question of law, as such, involved in this second appeal foi me to interfere with the said findings of fact, arrived at by the lower appellate Court on a proper appreciation of the evidence on record.

20. In these circumstance, the second appeal is dismissed. There will be no order as to costs. No leave.

R.S. —— *Appeal dismissed.*

1. (1974) 2 S.C.J. 517 : A.I.R. 1974 S.C. 171.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*S. Maharajan, J.*

Kuppayee Ammal .. *Appellant**

v.

Guruswami Padayachi (died) and others .. *Respondents.*

(A) *Civil Procedure Code* (*V of* 1908), *section* 60 (1) (n)—*Right to future maintenance—When attachable.*

(B) *Transfer of Property Act* (*IV of* 1882), *section* 6 (dd)—*Right to future maintenance cannot be transferred.*

A right to future maintenance is not attachable. Under section 6 (*dd*) of the Transfer of Property Act a right to future maintenance in whatsoever manner

* A.A. O. Nos. 36 and 37 of 1969.
17th October, 1974.

arising, secured or determined, cannot be transferred. But where under the guise of securing the right to future maintenance, possession of vast properties is given to the maintenance-holder or a charge is created in his favour in respect of the property for an amount far in excess of what would be reasonable for his maintenance, it is open to the Court to appoint a receiver and equitably execute the decree against him without violating either the provisions of section 60, Civil Procedure Code or clause (*d*) or (*dd*) of section 6 of the Transfer of Property Act. [*Paras*. 2, 3 *and* 4.]

Cases referred to:—

Rajendra Narain Singh v. *Sundara Bibi*, (1925) I.L.R. 47 All. 385 : 22 L.W. 284: 52 I.A. 262: (1925) 49 M.L.J. 243: A.I.R. 1925 P.C. 176; *Secretary of State for India* v. *Bai Somi*, (1933) I.L.R. 57 Bom. 507 ; *Sivjai Govinda Rao* v. *Chidambaram Chettiar*, (1935) 69 M.L.J. 264: 1935 M.W.N. 776: 42 M.L.W. 345: 158 I.C. 170: A.I.R. 1935 Mad. 815 ; *Venkataraju* v. *Sathiraju*, (1954) 2 M.L.J. 324 : 67 L.W. 499 : 1954 M.W.N. 451 : A.I.R. 1954 Mad. 946; *Palikandy Mammad* v. *Krishnan Nair*, (1917) I.L.R. 40 Mad. 302 : 30 M.L.J. 361 : 34 I.C. 381; *Subraya* v. *Krishna*, (1923) I.L.R. 46 Mad. 659: 45 M.L.J. 533: 73 I.C. 584: 19 M.L.W. 6: A I.R. 1924 Mad. 22.

Appeal against the order of the Court of the Subordinate Judge, Cuddalore dated 27th June, 1968 and made in C.M.A. Nos. 140 and 70 of 1967 respectively. (E.A. Nos. 1737/67 in O.S.No. 930/64 and E.P.No 989/66 in O.S.No.930/64 respectively on the file of the District Munsif Court, Cuddalore.)

S. Gopalarathinam for *K. Sarvabhauman* and *K. Sampath*, for Appellant in A.A.O. No. 36 of 1969 and for 2nd Respondent in A.A.O. No. 37 of 1969.

R. Nandakumar for *S. Narayanan*, for Appellant in A.A.O. No. 37 of 1969 and for 2nd Respondent in A.A.O. No. 36 of 1969.

N. Sivamani, for Respondents 3, 5, 8.

The Court made the following

ORDER.—These appeals arise under the following circumstances. One Guruswami Padayachi, the first respondent in both these appeals obtained a decree against Thillai Govinda Padayachi, who is the appellant in A.A.O. No. 37 of 1969 and who is the son of Kuppayee Ammal, the appellant in A.A.O. No. 36 of 1969. He filed E.P. No. 989 of 1966 on the file of the Court of the District Munsif of Cuddalore, for execution of the decree by the issue of a pro-order to the mother of the judgment-debtor prohibiting her from delivering the ten bags of paddy payable by her annually to her son under a maintenance deed dated 15th January, 1963.The Court issued notice to the garnishee, but as the garnishee did not appear, a pro-order was passed. Against that order, the garnishee preferred C.M.A. No. 140 of 1967 whereas the judgment-debtor preferred C.M.A. No. 70 of 1967 on the file of the Sub-Court, Cuddalore. Both the C.M.As. were dismissed by the Sub-Court. It is against the dismissal of these C.M.As. that the present civil miscellaneous second appeals have been filed.

2. Under clause (*n*) of the proviso to section 60 (1) of the Code of Civil Procedure, the right to future maintenance shall not be liable to attachment and sale in execution of a decree. There are some rulings to the effect that, once maintenance has fallen due and arrears of maintenance have become payable. the same may be attached. But the law is clear that a right to future maintenance is not attachable. The execution petition itself says that the ten bags of paddy, which the garnishee would be liable to pay to the judgment-debtor in future, should be attached. There is no allegation in the Execution Petition to the effect that the amount which the garnishee was liable to pay to the judgment-debtor under the maintenance deed had become due on the date of the execution petition. As the amount sought to be attached is not in the nature of past maintenance, but in the nature of future maintenance, the executing Court ought to have refused to order attachment. Both the Courts below went wrong in holding that the amount is attachable.

3. Learned counsel for the respondent, Mr. N. Sivamani, has cited before me a plethora of authorities in support of his contention that the amount payable to the judgment-debtor under the maintenance deed is attachable. Before considering the authorities cited, it is necessary to bear clearly in mind two distinct provisions of law which, if I may say so with great respect, have been confused, with the result

that a clear juridical principle could not be evolved. The first is the principle enshrined in section 60 (1) (*n*) Code of Civil Procedure which says that a right to future maintenance shall not be liable to attachment or sale. The other provision in section 6 (*d*) of the Transfer of Property Act which provides that an interest in property restricted in its enjoyment to the owner personally cannot be transferred by him. The scope for confusion between these two provisions arises in cases where the right to future maintenance is charged upon immovable property or where possession of immovable property is given to the maintenance-holder in lieu of his right to future maintenance. In such a case, the Court has to apply the double test, namely, (1) Is it an arrangement to secure the right to future maintenance ; (2) Is it an interest in property restricted in its enjoyment to the owner personally? Evidently, to remove a conflict that may arise in the application of these two provisions of law, the legislature incorporated Clause (*dd*) to section 6 of the Transfer of Property Act, by Act XX of 1929. That clause is to the effect that a right to future maintenance, by whatsoever manner arising, secured or determined, cannot be transferred.

4. In *Rajendra Narain Singh* v. *Sundara Bibi*[1] (This is a decision delivered before the incorporation of Clause (*dd*) to section 6 of the Transfer of Property Act) the Privy Council was called upon to consider the terms of a compromise deed which provided that the judgment-debtor in that case was to hold and possess sixteen villages yielding a profit of Rs.8,000 a year in lieu of his maintenance without power of transfer during the life time of his brother to whom he was to pay Rs. 7,872 a year in respect of the Government revenue, cesses and malikana. It was held by the Privy Council, when the interest of the judgment-debtor in the villages was sought to be attached and sold, that the judgment-debtor's interest was future maintenance within the meaning of section 60, sub-section (1) (*n*) of the Code of Civil Procedure and therefore could not be attached and sold. But their Lordships, however, directed that in such a case, a receiver should be appointed to realise the rents and profits, with a direction to pay thereout a sufficient and adequate sum for the maintenance of the judgment-debtor and his family, and to apply the balance (if any) to the liquidation of the judgment-debtor's debt. I am unable to perceive why Beaumont, C.J., in *Secretary of State for India* v. *Bai Somi*[1], should have observed that the above judgment of the Privy Council is a difficult one to interpret. It appears to me that the Privy Council has given an interpretation which gives the fullest effect to two apparently conflicting concepts. Where the right to future maintenance is secured by giving a large extent of immovable property fetching an income far in excess of the subsistence needs of the maintenance-holder and his family, it is certainly equitable that a receiver should be appointed to collect the rents and profits of the property and to pay out of the collections, an amount adequate for the maintenance of the maintenance-holder and apply the balance for the liquidation of his debts. Though, no doubt, the property is not attachable or saleable in execution, the appointment of a receiver is a specific relief which is granted to a decreeholder under section 51 (*d*) of the Code of Civil Procedure. The grant of such a relief would not violate either the provision contained in section 60, Code of Civil Procedure interdicting attachment of the right to future maintenance or the provision contained in section 6 (*d*) of the Transfer of Property Act which places an embargo upon the alienability of an interest in property restricted in its enjoyment to the owner personally. It appears that even the introduction of clause (*dd*) of section 6, Transfer of Property Act does not substantially affect the proposition laid down by the Privy Council. All that section 6 (*dd*) says is that a right to future maintenance, in whatsoever manner arising, secured or determined, cannot be transferred. But, where under the guise of securing the right to future maintenance possession of vast properties is given to the maintenance-holder or a charge is created in his favour in respect of the property for an amount far in excess of what would be reasonable for his maintenance, it is certainly open to the Court to appoint

1. (1925) I.L.R. 47 All. 385: 22 L.W. 284: 52 I.A. 262: A.I.R. 1925 P.C. 176.

1. (1933) I.L.R. 57 Bom. 507.

a receiver and equitably execute the decree without violating either the provisions of section 60, Code of Civil Procedure or the provisions of clauses (*d*) or (*dd*) or section 6 of the Transfer of Property Act. I shall explain a little later that the principle of the Privy Council ruling is not attracted by the facts of this case.

5. I may now refer to the ruling of King, J, in *Sivjai Govinda Rao* v. *Chidambaram Chettiar*[1]. There, the judgment debtor had usufructuarily mortgaged all his property and had provided as one of the terms of the mortgage transaction that the mortgagee should pay him an allowance of Rs.100 a month. Be it noted that the mortgagee in that case was neither morally nor legally liable to maintain the mortgagor, nor does it appear that the mortgage deed in that case characterised the monthly allowance payable to the mortgagor as a maintenance allowance. However, when that allowance was sought to be attached by the decree-holder, the judgment - debtor-mortgagor contended that the allowance was payable to him by the mortgagee specifically for his maintenance and it was his sole means of support, and consequently, exempt from attachment under section 60 (1) (*n*) of the Code of Civil Procedure. The learned Judge, upon an interpretation of the case-law, held that the allowance payable by the mortgagee to the mortgagor was not exempt from attachment. This is what the learned Judge says at page 268 :—

"In all those cases, the provision for an annuity or allowance was made by a vendor or a mortgagor as part of the transaction by which he sold or mortgaged his property, and as I have said, in all the cases, the annuity or allowance was held not to be exempt from attachment".

6. No doubt, in an earlier part of the judgment the learned Judge, while referring to the view of the District Judge made the following observations :—

"On the other hand, the view taken by the learned District Judge is that there must first exist the right to maintenance independently of contract, a right derived from the personal law and personal relationship of the parties, and only when such a right has been commuted can protection be afforded. Where the right is created for the first time by contract it is always alienable and subject to attachment. It seems to me from a study of the authorities that of these two views, the latter must prevail".

7. I am afraid that in this part of the judgment, which is really in the nature of *obiter dicta*, the learned Judge has put the juridical basis of his proposition a little too broadly. Learned counsel relying upon this *obiter* contends that under the personal law of the judgment-debtor in this case, there was no obligation on the part of his mother to pay any maintenance to the son and therefore inasmuch as the maintenance allowance payable to the judgment-debtor in this case is not a right derived from the personal law, but only a right which has been created for the first time by contract, the allowance is attachable in execution. I am unable to agree. In the execution petition itself the decree-holder has characterised it as maintenance allowance. It is stated at the Bar that the judgment-debtor is a tuberculosis patient and that is why he conveyed all his properties to his mother and was content to receive maintenance from his mother under the deed of maintenance dated 15th January, 1963. Further, the quantum of maintenance payable is only ten bags of paddy per year and that too in two half yearly instalments. It cannot be said that that quantum is suspiciously in excess of what would be necessary for keeping the body and soul of the judgment-debtor together. If fact, the decree-holder himself has valued the ten bags of paddy at Rs. 380, which would be hardly adequate for the annual subsistence of the judgment-debtor.

8. Reference may also be made to a ruling in *Venkataraju* v. *Sathiraju*[1]. There Mack, J., refused to follow the ruling of King, J., in *Sivjai Govinda Rao* v. *Chidam-*

1. (1935) 69 M.L.J. 264 : 1935 M.W.N. 776 : 42 M.L.W. 345 : 158 I.C. 170 : A.I.R. 1935 Mad. 815.

1. (1954) 2 M.L.J. 324 : 67 L.W. 499 : 1954 M.W.N. 451 : A.I.R. 1954 Mad. 946.

baram Chettiar[1], by saying that the learned Judge made a differentiation which was difficult to apply practically. I would refuse to follow the ruling of King, J., referrred to above on the ground that it is in conflict with the earlier Division Bench Judgment of this Court in *Palikandy Mammad* v. *Krishnan Nair*[2], as well as the decision of a Full Bench in *Subraya* v. *Krishna*[3]. I respectfully adopt the following observations of Mack, J., in *Venkataraju* v. *Sathiraju*[4]:

"There may be cases where a wealthy father may constitute a trust out of which a large sum of money has to be paid each month for the maintenance of his son or in lieu of his maintenance. It is manifestly inequitable that this sum which is far in excess of the needs of the son for maintenance should be put out of the reach of decree-holders; nor with respect to the view taken by King, J., in *Govinda Rao* v. *N.N.C.T.C.V. Firm*[5], can a practical distinction be drawn in these cases between maintenance dependent on personal law, personal relationship and personal obligation and a right to maintenance created by a contract. It is for the executing Court on the facts of each case to determine how much of an allowance should be made attachable having regard to the circumstances of each case. In a case involving collection or rents from property out of which any maintenance is payable, the appropriate remedy, described as equitable execution or indirect execution by appointment of a receiver adopted by the Privy Council in *Rajendra Narain Singh* v. *Sundara Bibi*[6] appears to be in harmony with this view. In this particular case, I have no hesitation in holding that Rs.60 a month maintenance provision made by a father to his son is, taking into consideration the cost of living today, a minimum maintenance provision, no portion of which is attachable by a decree-holder, who must look to some other asset or income of the judgment-debtor to proceed against in execution. Everything would depend upon the meaning of the word 'maintenance' that is, what in the opinion of the executing Court is, in the circumstances of the case, a reasonable maintenance. I can myself see no impediment in restricting the exemption in section 60 (1) (*n*) to maintenance pure and simple and anything, which, in the opinion of the executing Court, is in excess of maintenance not being exempt from attachment."

9. In this case, I am satisfied that the quantum of maintenance prescribed in the maintenance deed in favour of the judgment-debtor is hardly sufficient for his maintenance, and what the decree-holder seeks to attach in this case is clearly a right to future maintenance which is not attachable under section 60 (1) (*n*) of the Code of Civil Procedure. Unfortunately, the deed of maintenance has not been produced by the judgment-debtor in this case. It is the complaint of the decree-holder that the arrangement whereby the judgment-debtor transferred all his properties in favour of his mother and obtained a dead of maintenance from her is an arrangement entered into to defraud the creditors of the judgment-debtor. Nothing that I have said in this judgment shall be construed to prejudice this contention o the decree-holder.

10. In the result, the concurrent orders of the Courts below are reversed and the Execution Petition is directed to be dismissed. Both the appeals are allowed; but in the circumstances of the case, there will be no order as to costs in both appeals. Leave refused.

R.S. ——— *Appeals allowed.*

1. (1935) 69 M.L.J. 264 : 42 L.W. 345 : A.I.R. 1935 Mad. 815.
2. (1917) I.L.R. 40 Mad. 302 : 30 M.L.J. 361 : 34 I.C. 381.
3. (1923) I.L.R. 46 Mad. 659 : 45 M.L.J. 533 : 73 I.C. 584 : 19 M.L.W. 6 : A.I.R. 1924 Mad. 22.
4. 67 L.W 499: (1954) 2 M.L.J. 324 : 1954 M.W.N. 451: A.I.R. 1954 Mad. 946.
5. (1935) 69 M.L.J. 264 : 42 L.W. 345.
6. (1925) 49 M.L.J. 244: 22 L.W. 284: I.L.R. 47 All. 385: 52 I.A. 262: A.I.R. 1925 P.C. 176.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*P. R. Gokulakrishnan, J.*

Varadarajan .. *Petitioner**

v.

Govindaswamy and another .. *Respondents.*

Civil Procedure Code (V of 1908), section 115—Suit for declaration and injunction—Defendant entering appearance—Written statement filed—Defendant absent at time of trial—Set ex parte*—Counsel reporting no instructions—Suit decreed—Revision—Whether maintainable.*

A revision lies to the High Court as per section 115, Civil Procedure Code, when no appeal lies thereto from the judgment and decree sought to be revised. [*Para* 4.]

A revision cannot be maintained if an appeal lies to the High Court either directly or indirectly. [*Para.* 18.]

Cases referred to:—

Daw Min Baw v. *A.V.P.L.N. Chettiar Firm*, (1933) I.L.R. 11 Rangoon 134; *Sashi Kanta* v. *Nasirabad Loan Office Company*, A.I.R. 1936 Cal. 786; *Nanda Lal* v. *Askaram Baboo*, A.I.R. 1944 Cal. 309; *Kedaranath Lal* v. *Sheonarain Ram*, A.I.R. 1952 Pat. 280; *Vaithilingam Pillai* v. *Kandasami Pillai*, 33 M.L.W. 210 : 60 M.L.J. 713 : 132 I.C. 311 : A.I.R. 1931 Mad. 1; *Kulandai* v. *Indran Ramaswami*, 27 M.L.W. 286 : 108 I.C. 539 : I.L.R. 51 Mad. 664 : 55 M.L.J. 345; A.I.R. 1928 Mad. 416; *Pattammal* v. *Krishnaswami Iyer*, 112 I.C. 231 : A.I.R. 1928 Mad. 794; *Veerappa Thevar* v. *Kathaswami Chettiar*, (1966) 1 M.L.J. 427 : 79 L.W. 163 : I.L.R. (1966) 2 Mad. 546. A.I.R. 1967 Mad. 313 : *Jagannatha Prasad Gupta* v. *Ranganatha Konar*, (1966) 1 M.L.J. 451 : 79 M.L.W. 29 : I.L.R. (1967) 2 Mad. 542 : A.I.R. 1966 Mad. 370; *Vaishnav College for Women* v. *Mrs. Aleyamma Thomas*, (1971) 1 M.L.J. 76; *Joseph* v. *Varadarajan*, (1969) 2 M.L.J. 234; *S.S. Khanna* v. *F.J. Dillon*, (1964) 4 S.C.R. 409: A.I.R. 1964 S.C. 497.

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* C.R.P. S.R. No. 51709 of 1972.

31st October, 1974.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the District Munsif (Additional) Tirupattur, dated 7th February, 1972 and made in O.S. No. 912 of 1970.

T.V. Subramaniam, for Petitioner.

The Court made the following

ORDER.—The above matter has come up before me upon an office note for orders as to maintainability of the civil revision petition.

2. The suit O.S. No. 912 of 1970 was filed for declaration of the plaintiff's four-ninths share in the suit well and for restraining the defendants by means of a permanent injunction from interfering with the right of the plaintiffs to take water from the well through a channel LMN marked in the plaint sketch, passing through the land of the defendants to the first plaintiff's land, and through the LMN channel to the land of the second plaintiff. On the defendants entering appearance and filing their written statement, issues were framed by the trial Court. When the suit came up for trial on 7th February, 1972 the defendants, when called were absent, and they were set *ex parte*; their Counsel also reporting no instructions. On the first plaintiff proving the claim by examining himself as P.W. 1, the trial Court decreed the suit with costs as prayed for.

3. The first defendant, aggrieved by the decision of the trial Court, presented the civil revision petition against the judgment and decree in the suit. The office returned the papers questioning as to how a civil revision will lie when the decree is an appealable one. To this return, counsel for the petitioner re-presented the papers stating that no appeal lies to the High Court from the decree of the District Munsif, that the petitioner has not filed any appeal to the District Court, that he desires to challenge the regularity and legality of the decree on grounds of revision and that if the petition is otherwise in order, the existence of an alternative remedy by way of appeal to a subordinate Court is not a bar to entertaining the revision. On this re-presentation and statement by the Counsel for the peti-

tioner, the office has posted this matter before this Court for orders regarding the maintainability of the civil revision petition. The question that has to be decided is as to whether a revision to the High Court is competent when, as per the provisions of the Code of Civil Procedure, the petitioner has a right to prefer an appeal to the appellate Court.

4. Thiru T.V. Subramaniam, the learned counsel appearing for the petitioner, citing, section 115, Civil Procedure Code, argued that an appeal will not directly lie to the High Court from the judgement and decree in O.S. No. 912 of 1970 and as such the revision is maintainable.

Section 115, Civil Procedure Code, reads:

> "The High Court may call for the record of any case which has been decided in any Court subordinate to such High Court and in which no appeal lies there to, and if such subordinate Court appears:
>
> (a) ....
>
> (b) ....
>
> (c) ....
>
> the High Court may make such order in the case as it thinks fit."

Thus, a revision will lie, as per section 115. Civil Procedure Code, to the High Court only when no appeal lies thereto from the judgment and decree sought to be revised. Thiru T.V. Subramaniam, the learned counsel appearing for the petitioner submitted that "no appeal lies thereto" means that no appeal will lie directly to the High Court from the judgment and decree in question. According to the learned Counsel, an appeal would lie, in this case, only to a Court subordinate to the High Court, and not to the High Court itself directly. No doubt, an appeal might come up to the High Court by way of a "second appeal" from the decision of the appellate Court. But that is not contemplated by the clause " in which no appeal lies thereto ". According to the learned Counsel, since no appeal directly would lie to the High Court from the decree and judgment in O.S. No. 912 of 1970, the revision filed under section 115. Civil Procedure Code, is not prohibited.

5. Number of authorities were cited, which I will refer for the purpose of deciding on the maintainability of the present civil revision petition.

Daw Min Baw v. *A.V.P.L.N. Chettiar Firm*[1] was relied on by the learned Counsel for the petitioner in support of his contention. There a single Judge of the Rangoon High Court held:

> " Under section 115 of the Civil Procedure Code, the High Court is entitled to entertain an application for revision from the decision of any Court subordinate thereto from which no direct appeal lies thereto. The fact that an appeal lies from such decision to a lower appellate Court and thereafter a second appeal to the High Court, does not prevent the High Court from exercising its revisional powers directly in a proper case. The word ' case ' in section 115 ot the Civil Procedure Code, includes not only original cases but also first appeal cases. "

6. A single Judge of the Calcutta High Court, in *Sashi Kanta* v. *Nasirabad Loan Office Company*[2], held:

> " Revisional power of the High Court under section 115 is a bar only when an appeal lies to High Court. The fact that an appeal lay to the lower appellate Court will not take away the powers of the High Court to revise the order of the trial Court. The language of section 115 is that the High Court may call for the record of any case which has been decided by any Court subordinate to such High Court in which no appeal lies thereto. "

7. The Bench in *Nanda Lal* v. *Askaran Baboo*[3]; stated:

> " The precise meaning of the word ' thereto ' has given rise to some controversy, but it seems to us that it can only refer to the High Court and not a Court subordinate to the High Court."

Though in the above case it has been held that the word " thereto " occurring in section 115, Civil Procedure Code, refers

1. (1933) I.L.R. 11 Rang. 134.
2. A.I.R. 1936 Cal. 786.
3. A.I.R. 1944 Cal. 309.

only to the High Court, that was a case where no second appeal even lay to the High Court.

8. In *Kedaranath Lal* v. *Sheonarain Ram*[1], a single Judge of the Patna High Court has held :

"Section 115 means that the High Court cannot act only in those cases in which an appeal lies to that Court. The fact that an appeal lies to the lower appellate Court does not take away the High Court's power of revision."

Even in the above case, no second appeal lay to the High Court.

9. The citation given by the learned counsel which is reported in *Vaithilingam Pillai* v. *Kandaswami Pillai*[2], deals with powers of the High Court to interfere in revision under section 115, Civil Procedure Code. That has nothing to do with the facts of the present case or with the interpretation of section 115, Civil Procedure Code.

10. Thiru T.V. Subramaniam cited the Bench decision in *Kulandai* v. *Indran Ramaswami*[3], for the proposition that the High Court can interfere and correct the mistake of the trial Court under section 115, Civil Procedure Code. That was a case in which a revision was filed against the order of the trial Court holding that the Court-fee paid was not proper and until the proper Court-fee was paid the suit could not be proceeded with. In that case the High Court felt that the trial Court had failed to exercise jurisdiction and observed that while Courts would not generally interfere in revision where an equally efficacious remedy is open to the party they have in several cases interfered where the remedy by way of appeal would entail unnecessary hardship on the party, involve multiplicity of proceedings, or would not give the party as complete and efficacious a relief as interference with an interlocutory order and the case satisfied the requirements of section 115, Civil Procedure Code. The contention in that case was that the party could have filed an appeal against the dismissal of the suit itself on the ground that proper Court-fee had not been paid. In the interests of justice the High Court interfered with the order holding that such interference under section 115, Civil Procedure Code, to correct a mistake was justifiable. I do not think the said decision is helpful. to decide the question in issue.

11. Thiru T.V. Subramaniam also cited cases which hold the view that a revision is not maintainable when directly or indirectly an appeal lies to the High Court. In *Pattammal* v. *Krishnaswami Iyer*[1], a single Judge of this High Court stated :

"Any order which may be brought up in appeal to the High Court either directly or after an intermediate appeal to a lower Court should be held to be a case in which an appeal lies to the High Court."

12. On this observation, this High Court held that a revision will not lie when a second appeal is competent to the High Court.

13. In *Veerappa Thevar* v. *Kathaswami Chettiar*[2], Natesan, J., has held that section 115 is available only when there is no appeal to the High Court and that if an appeal lies to the High Court even by way of second appeal it could not entertain a revision under section 115 of the Code of Civil Procedure.

In *Jagannatha Prasad Gupta* v. *Ranganatha Konar*[3]., Kailasam, J., has stated :

"The power of revision may be exercised in any case, which has been decided by a Court subordinate to the High Court in which no appeal lies thereto. We are concerned with the words "in which no appeal lies thereto"; it has been held that, if an appeal lies in the High Court against the order sought to be revised, a revision is not competent. The appeal to the High Court may not necessarily be directly from the order complained against. An appeal may

1. A.I.R. 1952 Pat. 280.
2. 33 M.L.W. 210 : 60 M.L.J. 713 : 132 I.C. 311 : A.I.R. 1931 Mad. 1.
3. 27 M.L.W. 286 : 108 I.C. 539 : I.L.R. 51 Mad. 664 : 55 M.L.J. 345 : A.I.R. 1928 Mad. 416.

1. 112 I.C. 231 : A.I.R. 1928 Mad. 794.
2. (1966) 1 M.L.J. 427 : 79 M.L.W. 163 : I.L.R. (1966) 2 Mad. 546 : A.I.R. 1967 Mad. 313.
3. (1966) 1 M.L.J. 451 : 79 Mad.L.W. 29 : I.L.R. (1967) 2 Mad. 542 : A.I.R. 1966 Mad. 370.

lie to the High Court indirectly by way of a second appeal. Even then, the revisional jurisdiction of the High Court under section 115, Civil Procedure Code has been held to be barred."

14. In *Vaishnav College for Women* v. *Mrs. Aleyamma Thomas*[1], Ramanujam, J., dealing with a revision against the order passed in an interlocutory application for an injunction by the District Munsif of Poonamallee, held :

"In this case, against the order in question, the petitioner has no right of appeal to this Court directly or indirectly. He has only a remedy by way of an appeal to the District Court without any further right of appeal to this Court. In view of this position, I am of the view that there is no bar in entertaining this revision petition under section 115 of the Code."

Thus, in this case, since no appeal even ultimately is provided to the High Court, the High Court held that a revision is competent. This does not mean that a revision is competent when an appeal is provided directly or indirectly to the High Court.

15. In spite of the above decisions of our High Court against the principle propounded by the learned Counsel appearing for the petitioner, he tried to press his point by citing the decision reported in *Joseph* v. *Varadarajan*[2]. There, Ramaprasada Rao, J., held that the jurisdiction exercised by the High Court under section 115 Civil Procedure Code, is wholesome, supervisory and visitorial. From the facts of that case it is clear that from an order passed under Order 33, r. 5 (d-1) an appeal is provided under Order 43, r. 1 (*nn*) to the District Court and there is no further appeal to the High Court. In those circumstances, the learned Judge held that the rule of practice set out in the section enables the High Court to entertain a revision against the original order even though an appeal is provided to the District Court, provided no appeal lay against the appellate order of the District Judge. Thus, I am of opinion there is absolutely no conflict between this decision, and the other decisions of the single Judges of this High Court noticed supra.

1. (1971) 1 M.L.J. 76.
2. (1969) 2 M.L.J. 234.

16. *S.S. Khanna* v. *F.J. Dillon*[1], dealing with the expression "case" occurring in section 115, Civil Procedure Code, the Supreme Court held :

"The expression 'case' is a word of comprehensive import ; it includes civil proceedings other than suits, and is not restricted by anything contained in the section to the entirety of the proceedings in a civil Court. To interpret the expression 'case' as an entire proceeding only and not a part of a proceeding would be to impose a restriction upon the exercise of powers of superintendence to which the jurisdiction to issue writs, and the supervisory jurisdiction are not subject, and may result in certain cases in denying relief to an aggrieved litigant against where it is most needed, and may result in the perpetration of gross injustice"...."The expression 'case' includes a suit, but in ascertaining the limits of the jurisdiction of the High Court, there would be no warrant for equating it with a suit alone."

17. Thus, the Supreme Court, in a case where the trial Court on a preliminary issue decided that the suit being by a partner against another partner of a dissolved firm which was in the process of winding up and in respect of advances from the partnership assets, was not maintainable, held that an order comes under the definition of "case" and as such the revision was maintainable to the High Court. Dealing further, Hidayatullah, J., (as he then was) observed :

"The present cases answer the description as the orders of the Subordinate Judge were erroneous in denying a jurisdction and no appeal lay to the High Court against them. Even otherwise, the trial Judge was in error in not dismissing the suits. His decision that the suits were not maintainable and yet keeping them pending was itself an exercise of jurisdiction with material irregularity. If the trial Judge had dismissed the suits and passed decrees there would undoubtedly have been ap-

1. (1964) 4 S.C.R. 409 : A.I.R. 1964 S.C. 497.

peals and no revision would have lain. But the order actually passed by him was not a decree or even an order made appealable by section 104 of the Code. Involving as it did a clear question of jurisdiction it was revisable and the High Court was within its rights in correcting it by the exercise of its powers under section 115 of the Code."

The above Supreme Court decision does not warrant the conclusion that the High Court can interfere in revision under section 115 though an appeal lies to the High Court either directly or indirectly. On the other hand, the facts of the case dealt with by the Supreme Court and the discussion pertaining to the same, centered round the word " case " occurring in section 115, Civil Procedure Code, and incidentally the Supreme Court observed that if the trial Judge had dismissed the suits and passed decrees, there would undoubtedly, have been appeals and no revision would have lain'

18. On an analysis of the decisions referred to above, the principle enunciated by single Judges of this Court is that a revision cannot be maintained if an appeal lies to the High Court either directly or indirectly. Admittedly, in the present case, a second appeal will lie from the decision rendered by the trial Court subsequent to the disposal of the case by the lower appellate Court by way of a first appeal I am not agreeing with the principle stated in *Daw Min Baw* v. *A. V. P. L. N. Chettiyar Firm*[1], *Nanda Lal* v. *Askaran Baboo*[2], *Sashi Kanta* v. *Nasirabad Loan Office Company*[3], and other decisions supporting this view.

19. In these circumstances, the revision is not maintainable.

R. S. *Order accordingly.*

1. I.L.R. (1933) 11 Rang. 134.
2. A.I.R. 1944 Cal. 309.
3. A.I.R. 1936 Cal. 786.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*M. M. Ismail, J.*

Pazhancottai Match Factory a firm carrying on business in Partnership at Pazhancottai Kalugumalai under No. 1847 of 1963 under Indian Partnership Act .. *Appellant**

v.

Siva Match Industries, a firm manufacturing safety matches at Puliangudi P.O., Tirunelveli District and others .. *Respondents.*

Trade and Merchandise Marks Act (XLIII of 1958), *section* 38 (1)—*Unregistered Trade Mark—Whether assignable or transmissible and when—Passing-off action—Ingredients to be proved.*

Section 38 (1) of the Trade and Merchandise Marks Act clearly contemplates that an unregistered trade mark shall not be assignable or transmissible except along with the good-will of the business concerned. Sub-section (2) deals with certain exceptions. [*Para.* 7.]

In a passing off action, in the absence of evidence to show that the public had grown to associate the name or mark, (which the plaintiff claims) as his with the plaintiff as the manufacturer of the goods (matches) in question, the suit is liable to be dismissed. [*Para.* 13.]

Cases referred to :—

Batchayi Rowther v. *Ramaswami Pillai*, (1936) 43 L.W. 210: 160 I.C. 428: A.I.R. 1936 Mad. 8; *Venkatachalam* v. *Rajagopala*, 36 L.W. 498 : 63 M.L.J. 568 : I.L.R. 55 Mad. 966 : 41 I.C. 660: A.I.R. 1932 Mad. 705 ; *Dhanalakshmi Ammal and another* v. *K. Dhanakoti Naidu*, (1962) 1 M.L.J. 365: 74 L.W. 666 : I.L.R. 1962 Mad. 209 : A.I.R 1962 Mad. 127 ; *Loahy, Kelly and Leahy* v. *Glover*, (1893) 10 R.P.C. 141 at 155.

Appeal against the decree of the District Court, Tirunelveli made in Original Suit No. 24 of 1965.

* Appeal No. 236 of 1970.

5th November, 1974.

P. Ramaswami, for Appellant.

A. Subbiah, *S. Gopalaratnam* and *K. Kulandaivelu*, for Respondents.

The Court delivered the following

JUDGMENT :—The plaintiff in O.S No. 24 of 1965 on the file of the District Judge, Tirunelveli, is the appellant herein. In view of the narrow compass in which the appeal was argued, before me, it is not necessary to refer to the controversy between the parties very elaborately. The appellant is a firm registered under the Partnership Act, manufacturing and selling safety matches under the name, label and trade mark of Delux Safety Matches The appellant instituted the suit praying: (*i*) for an injunction restraining the defendants, their servants and agents from passing off or attempting to pass off and from enabling others to pass off safety matches, not of the plaintiff's (appellant's)manufacture, as the goods of the appellant by using the name either "Delux"or "Deluxe"and the trade mark similar to the one used by the appellant or by using packages of similar make and appearance as those used by the appellant for their goods; (*ii*) directing the defendants to deliver to the appellant for destruction all blocks, printed labels etc, used in the manufacture of the label for safety matches; and (*iii*) directing an account to be taken of the profits made by the defendants by the sale of their goods from August ,1965 and payment of the same to the appellant.

2. Defendants 1 and 2 filed a common written statement and defendants 3 to 23 filed a common written statement, and they denied the allegations of the appellant and the claim put forward by it.

3. On the above pleadings, the learned District Judge framed the following issues:

1. Whether the plaintiff has acquired a monopoly right over the trade mark claimed by it?

2. Whether the defendants are trying to pass off their goods as that of the Plaintiff?

3. Whether the suit is not maintainable in this Court?

4. To what reliefs, if any, is the plaintiff entitled?

4. The learned District Judge held issues Nos. 1 and 2 against the appellant and in view of those findings on issues Nos. 1 and 2, the suit itself was dismissed. It is against this dismissal of the suit the present appeal has been filed by the plaintiff in the suit.

5. Before I refer to the scope of the appeal itself, I must refer to the findings of the learned District Judge. Exhibits A-10 and A-11 are the trade marks used by the appellant for its products. Exhibits B-10, B-11, A-13 to A-24, are the marks used by defendants 1 to 3, 7, 10, 15, 4,8, 11,17, 5,9, 13 and 20 respectively. The learned Judge found that a perusal of those several labels left no one in doubt that they were deceptively similar to each other, that it was not necessary that the appellant should prove that the similarity in the marks had actually deceived the buyers, and that what had got to be found was whether an ordinary buyer would not be deceived by the close similarity. Notwithstanding this finding of his, the learned District Judge, dismissed the suit on the ground that the establishment of that fact alone was not sufficient and that it must also be shown that the public had grown to associate that name or mark with the appellant as the manufacturer of the matches in question. The learned Judge found that that association or connection in the public mind had not been established in the present case. In view of this alone he dismissed the suit.

6. The appeal itself has not been pressed against respondents 1 to 7, 13 to 19 and 21 on the ground that they have given an undertaking to the appellant that they would not use similar labels hereafter, and was pressed only as against the other respondents. Mr. P. Ramaswami, the learned counsel for the appellant, advanced two arguments in support of this appeal. The first argument is that the learned Judge has held that there had been no assignment or transmission of the trade mark in question from its original owner and that that conclusion is not correct,because the appellant had obtained the consent of the original owner for the use of the trade mark in question. The second argument is that the learned Judge, for coming to

the conclusion that it is not enough if the plaintiff shows that his product had acquired a reputation in the market, but he must also show that the public have grown to associate the particular name or mark with the appellant or his product has relied on the decision of this Court in *Batchayi Rowther* v. *Ramaswami Pillai*[1], and that subsequent decisions have held that such a requirement was not necessary. I shall now deal with these two points separately.

7. In my opinion, as far as the first point is concerned, it is really not material. Because of some argument advanced before the learned District Judge, he has referred to the definition of the expression 'assignment' as contained in section 2 (1) (*a*) and the definition of the expression 'transmission' as contained in section 2 (1) (*w*) of the Trade and Merchandise Marks Act, 1958. The case of the appellant was that the trade mark belonged to one New Jothi Match Industries, that with, the consent of New Jothi Match Industries the appellant used that trade mark and that that consent would constitute assignment as that consent was in writing. This question came to be considered in view of the provisions contained in section 38 of the Act, referred to above. I must, even at this stage, refer to the fact that the entire controversy before the trial Court proceeded on the basis of the trade mark of the appellant being an unregistered one. Section 38 (*i*) of the Act states that an unregistered trade mark shall not be assignable or transmissible except along with the goodwill of the business concerned. Sub-section (2) of this section deals with certain exceptions. The learned District Judge, in paragraph 12 of his judgment, points out that it was conceded by the appellant before him that sub-section (2) of section 38 did not apply to his case. If so, there is no meaning in even relying upon Exhibit A-9 the consent said to have been given by New Jothi Match Industries for the appellant using their trade mark as an assignment, because section 38 (*i*) clearly contemplates that an unregistered trade mark shall not be assignable or transmissible except along with the goodwill of the business concerned. It is not the case of the appellant that it had acquired the goodwill of New Jothi Match Industries. Therefore it is not necessary to consider this question further, because it will not be of any assistance to the appellant.

8. As far as the second question is concerned, the learned Judge has relied on several decisions for coming to the conclusion which he did, and among them are two decisions of this Court, one which I have already referred to, *viz.*, *Batchayi Rowther* v. *Ramaswami Pillai*[1] and the other *Venkatachalam* v. *Rajagopala*[2]. *Venkatachalam* v. *Rajagopala*[2], is a decision of a Bench of this Court. The second head-note to that decision sets out the conclusion. That head-note reads as follows :—

> " that the plaintiff must prove that the name had acquired a secondary meaning and had come to mean goods manufactuted by themselves and not by other manufacturers before the question whether the defendants had infringed the plaintiffs' right could be considered. The mere fact that the plaintiffs' goods of that name had acquired a considerable reputation is not enough. Nor the fact that in a particular place by its universal use the name had acquired a secondary signification will entitle the plaintiff to have an injunction in every part of the country".

9. This conclusion was arrived at by the Bench of this Court after referring to a number of English cases. This decision of the Bench is binding on me. The other decision, as I already pointed out, is *Batchayi Rowther* v. *Ramaswami Pillai*[1]. The head-note of that decision which brings out the principle, states :—

> " Before a dealer can restrain another from using a name or mark, it is not sufficient to show that the article with that name or mark has acquired a reputation in the market, but it must

1. (1936) 43 L.W. 210 : 160 I.C. 428 : A.I.R. 1936 Mad. 8.

1. (1936) 43 L.W. 210 : 160 I.C. 428: A.I.R. 1936 Mad. 8.
2. 36 L.W. 498 : 63 M.L.J. 568 : I.L.R. 55 Mad. 966 : 141 I.C. 660 : A.I.R. 1932 Mad. 705.

also be shown that the public have grown to associate that particular name or mark with himself as the manufacturer of or dealer in that article. Hence in a case where there is asbolutely no evidence to establish any such association in the public mind between the plaintiff's business and the goods bearing the mark in question, his suit to restrain another from using that mark is not sustainable".

10. Thus, on the finding of the learned District Judge that there was no evidence placed before him by the appellant to show that in the public mind an association between the appellant's business and the goods bearing the mark in question had been established, these two decisions are directly against the appellant herein. As already pointed out by me, that finding was not questiond before me and all that the learned counsel contended was that there were subsequent decision to the above decisions holding that such establishment of association or connection was not necessary. In support of this contention the learned counsel for the appellant invited my attention to a judgment of a single Judge of this Court in *Indian Dental Works by its proprietor, Dhanalakshmi Ammal and another* v. *K. Dhanakoti Naidu*[1]. In particular, the learned counsel relied on the following sentences occurring at page 369 :

"It is true there is evidence in this case that people have been misled by the first defendant's trade mark into believing that the goods produced by the first defendant are really the goods of the plaintiffs. But even without such evidence it is for me to assess the value of the contention that the public are likely to be misled by the two trade marks. I have perused the two trade marks and they resemble each other very closely both in get-up, in the colour scheme adopted, and, in the descriptive matter and above all in the picture of the human face and the numeral 1431. These are, in my opinion, sufficient to show that the first defendant consciously adopted his trade mark with the idea of pirating the trade mark of the plaintiffs."

In my opinion the above passage has no bearing on the question actually decided by this Court in the two decisions referred to above and argued before me. In view of this fact I am unable to hold that this decision is of any assistance whatever to the appellant herein.

11. Apart from the decisions referred to above, the law regarding a passing off action is clear and has been set out in Kerly's Law of Trade Marks and Trade Names (Ninth Edition) at pages 367 and 380. At page 367 it is stated :

"It is essential to the success of any claim in respect of passing off, based on the use of a given mark or get-up, that the plaintiff should be able to show that the disputed mark or get-up has become by user in this country distinctive of the plaintiff's goods, so that the use in relation to any goods of the kind dealt with by the plaintiff of that mark or get-up will be understood by the trade and public in this country as meaning that the goods are the plaintiff's goods."

At page 380 it is stated :

"Nevertheless, the plaintiff must establish on the one hand that the badge of trade concerned has been used for goods or a business that are not his or at least they have no right to the badge so as to be recommended by it. On the other hand, if the plaintiff cannot prove the association, in this country, of the mark or get-up concerned with goods that in fact are his (or, in the case of a business name, associated with his business) the action fails *in limine*. The foundation of a passing off case is that the party alleging it should prove, in the first instance, that any name which he claims as his trade name has been so extensively used in connection with his manufacture or with the goods which he sells that his goods have come to be known in the market by that name ; that anyone using that name would intend to refer to his goods ; and that anyone to whom the name was used would understand that his goods were referred to."

1. (1962) 1 M.L.J. 365 : 64 L.W. 666 : I.L.R. (1962) Mad. 209 : A.I.R. 1962 Mad. 122.

The above proposition has been taken from the statement of the law laid down by Herschell, L.C., in *Loahy, Kelly and Leahy* v. *Clover*[1].

12. As I already pointed out, the present suit of the appellant is a passing off action and the above principle of law directly applies to it, and, on the finding of the learned District Judge that no evidence has been placed to prove such association, the suit was rightly dismissed by the learned District Judge. Hence the appeal fails and is dismissed with the costs of the 24th respondent.

R.S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*P. S. Kailasam, J.*

Hemalnath .. *Petitioner**

B. Kasthuri .. *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), *section* 10 (4)—*Eviction petition by landlady on ground of need for additional accommodation —Landlady's husband in essential service—Tenant also in essential service—Meaning of "landlord is himself engaged in any employment or class of employment which has been so notified."*

In section 10 (4) of Tamil Nadu Act (XVIII of 1960), the words "landlord is himself engaged in any employment or class of employment which has been so notified" should be construed to include a landlady's husband being engaged in essential service. [*Para.* 3]

Cases referred to:—

Saraswathi v. *Vadivelu Chettiar*, (1967) 2 M.L.J. 81 : I.L.R. (1968) 2 Mad. 584 : 80 L.W. 408 : A.I.R. 1968 Mad. 70 ; *Kolaindavelu Chettiar* v. *Koolavana Chettiar* (1961) 1 M.L.J. 184 ; *Kangu* v. *Ahmed Unnisa Begum*, (1963) 1 M.L.J. 97.

1. (1893) 10 R.P.C. 141 at 155.

* C.R.P. No. 2304 of 1974 and C. M. P. No. 10142 of 1974.

10th January, 1975.

Petition under section 25 of Tamil Nadu Act XVIII of 1960 as amended by Act XXIII of 1973 praying the High Court to revise the order of the Second Judge Court of Small Causes, Madras dated 27th April 1974 and made in H.R.A. No. 110 of 1974 (H.R.C. No. 539 of 1971 on the file of the Sixth Judge, Court of the Small Cuases Madras (VI Judge). and Petition praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to stay all further proceedings in the above Civil Revision Petition and direct the respondent to put the petitioner in possession of the building forming the subject-matter in H.R.C.No.539 of 1971 on the file of the Court of the Small Causes (VI Judge) Madras.

T.S. Purushotham, for Petitioner.

K. Chandramouli, for Respondent.

The Court delivered the following

JUDGMENT.—The Civl Revision Peititon is filed by the tenant against the order passed by the appellate authority, Second Judge, Court of Small Causes, Madras, directing his eviction on the ground that the landlady *bona fide* required the premises for additional accommodation and that the landlady is entiled to maintain the application as her husband was an employee in an essential service. In this Civil Revision Petition, a Civll Miscellaneous petition under section 11 (4) of Act XVIII of 1960 praying that all fruther proceedings be stopped in the Civil Revision Petition and that a direction may be given that the landlady be put in possession, was also filed by the landlady. No counter-affidavit has been filed by the tenant as far as this petition is concerned.

2. The Rent Controller found that the requirement of the landlady of the portion under the occupation of the tenant for additional accommodation was *bona fide*. Therefore, he allowed the petition of the landlady and directed eviction of the tenant. On appeal, the appellate authority confirmed the finding that the landlady *bona fide* required the premises for her own accommodation. Before the appellate authority it was contended on

behalf of the tenant that the tenant is employed in the railway service, an essential service, and entitled to the benefit of section 10 (4) of the Act, and that as the landlady is not employed in essential service, she is not entitled to have the tenant evicted. The appellate authority held that as the landlady's husband is in essential service, even though the landlady's husband is not the owner of the property, the requirement is for the benefit of the entire family and since the landlady's husband, who is the head of the family, is in essential service, that can be taken into consideration in finding that since the landlady's husband also is in essential service, the tenant is not entitled to the protection asked for.

3. In the revision petition, Mr. Purushothaman, learned counsel for the tenant, submitted that the landlady is not entitled to ask for eviction, as the landlady is not in essential service. Section 10 (4) of the Act provides that no order for eviction shall be passed under sub-section (3) against any tenant who is engaged in any employment or class of employment, notified by the Government as an essential service for the purposes of that sub-section, unless the landlord is himself engaged in any employment or class of employment which has been so notified. It is not in dispute that the landlady's husband is employed in an essential service. The only question that arises is whether the section requires that the landlady herself should be employed in an essential service or whether the employment of her husband in the essential service is sufficient to confer benefit on her. Reading the section literally, it appears that the landlord should be employed in the essential service. But the word "landlord" in the various provisions of the Act has been given a wider meaning by Courts. In *Saraswathi* v. *Vadivelu Chettiar*[1], in construing the word "landlord occurring in section 10 (3) (*a*) (iii), following the decisions reported in *Kolaindavelu Chettiar* v. *Koolavana Chettiar*[2], and *Kangu* v. *Ahmed Unnisa Begum*[3], it was held that the landlord's requirement for his own occupation would include the requirement of his closer relatives, which would depend upon the social customs, habits, usage, practice, in the particular community, etc, The benefit conferred on the tenant belonging to an essential service, who is not liable to eviction, is taken away only when the landlord also belongs to an essential service. In construing the words, I feel that the Court will not be justified in giving a very restricted meaning to the word especially when the Courts have generally given a wider interpretation. "Landlord " is defined in section 2 (6) as including a person who is receiving or is entitled to receive the rent of a building whether on his own account or on behalf of another. In this case, the landlady's husband would have been perfectly entitled to receive the rent on behalf of his wife, and if the petition was filed on that basis, the husband would have claimed as landlord and defeated the claim of the tenant that he is not liable to be evicted, as the husband is in the essential service itself. While the intention of the Act is to prevent unreasonable eviction of the tenant, it was not intended to be harsh on the landlord, whose requirement was genuine. It would be contrary to all established customs and usages prevalent in the society to hold that the husband's requirement is not the requirement of the wife, or the exemption to which the husband is entitled is not available to the wife. As already pointed out, by appropriate pleadings, the plea of the tenant could have been successfully resisted. Taking all these circumstances into account, I agree with the appellate authority that the words "landlord is himself engaged in any employment or class of employment which has been so notified" should be construed to include landlady's husband being engaged in essential service. I do not see any ground for not accepting the conclusion arrived at by the appellate authority.

4. In addition the petitioner cannot resist the miscellaneous petition filed by the landlady for stopping all proceedings in the Civil Revision Petition. The tenant has not even filed a counter-affidavit to this miscellaneous petition. In the miscellaneous petition it is alleged that the

1. (1967) 2 M.L.J. 81 : I.L.R. (1968) 2 Mad. 584 : 80 L.W. 408 : A.I.R. 1968 Mad. 70.
2. (1961) 1 M.L.J. 184.
3. (1963) 1 M.L.J. 97.

tenant has not paid the rent and is in arrears for about 11 months before the date of this miscellaneous petition. It is also alleged that in the written statement filed in the suit, the tenant has admitted that he is in arrears of rent from November, 1973. Section 11 of the Act provides that no tenant against whom an application for eviction has been made by a landlord under section 10 shall be entitled to contest the application before the Controller under that section, or to prefer any appeal under section 23 against any order made by the Controller on the application, unless he has paid or pays to the landlord, or deposits with the Controller or the appellate authority, as the case may be, all arrears of rent due in respect of the building up to the date of payment or deposit, and continues to pay or to deposit any rent which may subsequently become due in respect of the building until the termination of the proceedings before the Controller or the appellate authority, as the case may be. Though this sub-section is strictly applicable to the proceedings before the Rent Controller and the appellate authority, the principle can be and should be applied in proceedings in revision petitions also. The tenant cannot refrain from paying the rent merely because he has filed a civil revision petition. Whether section 11 (1) is applicable or not, the civil revision petition is liable to be dismissed on the ground that the tenant had defaulted in the payment of rent pending the civil revision petition. On this ground also, this revision petition is dismissed with costs. C. M. P. No. 10142 of 1974 is allowed.

S.J. —— *Petition dismissed.*
C.M.P. allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*N. S. Ramaswami, J.*

V. P. Padmavathi Ammal and others .. *Appellants**

v.

P. S. Swaminatha Iyer and another .. *Respondents*

Transfer of Property Act (IV of 1882), *section* 69 (3)—*Auction sale—Auction purchaser filing suit for possession —Cross-examination of plaintiff—Question whether plaintiff is a nominee of mortgagee—Question disallowed —Appeal.*

If a mortgagee cannot effect a valid sale in his own favour, by merely putting up his nominee, the position would not be different, if really the plaintiff, auction-purchaser is only a nominee of the mortgagee the sale would be *ab initio* void.

[*Para.* 2].

Cases referred to :—

Egmore Benefit Society v. *Aburupammal*, (1943) 1 M.L.J. 92 : A.I.R. 1943 Mad. 301 ; *Govindaswami Naicker* v. *Pukhraj Sowcar*, 1940 M.W.N. 772 : (1940) 2 M.L.J. 281: A.I.R. 1940 Mad. 903.

Appeal against the decree of the City Civil Court (IV Assistant Judge) Madras dated 22nd July, 1964 and passed in O.S. No. 1953 of 1961 and Petition under section 115, Civil Procedure Code, praying the High Court to revise the order of the City Civil Court (IV Assistant Judge) Madras dated 22nd July, 1964 and made in O. S. No. 1953 of 1961.

K. Swamidurai, for Appellant.

N. S. Raghavan, for Respondent.

The Court delivered the following

JUDGMENT.—The legal representatives of a mortgagor whose property had been sold under section 69 of the Transfer of property Act are the appellants in the appeal and the petitioners in the revision peti-

* Appeal No. 477 of 1969 and
C.R.P. No. 2497 of 1967.

11th February, 1975.

tion. The plaintiff who is the auction-purchaser of the property filed the suit for possession. It was resisted by the legal representatives of the mortgagor who have been impleaded as defendants 1 to 8 in the suit, on the ground that the plaintiff is only a nominee of the mortgagee and that therefore the private sale under section 69 of the Transfer of Property Act is wholly invalid. An issue was framed touching the above question. However, at the time of the trial, when the defendants wanted to cross-examine the plaintiff while he was in the witness box, regarding the question whether he was only a nominee of the mortgagee, the Court below held that by virtue of sub-section (3) of section 69, it was not open to the defendants to attack the sale in the manner in which they tried to do, and disallowed the cross-examination which was sought to be made. The learned Judge passed an order holding that the defendants cannot be permitted to put any question to the plaintiff and his witnesses regarding the question whether the plaintiff was only a nominee of the mortgage. Against the above said order, the revision petition is filed. As the defendants had been prevented from cross-examining the plaintiff, they did not take further part in the trial of the suit and the suit was decreed. Against the decree, the appeal has been filed.

2. I am satisfied that the order of the Court below disallowing questions in cross-examination regarding the plea taken by the defendants is wholly wrong. Sub-section (3) of section 69 which has been relied on by the Court below is in the following terms :

> " When a sale has been made in professed exercise of such power, the title of the purchaser shall not be impeachable on the ground that no case has arisen to authorise the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised ; but any person damnified by an unauthorised or improper or irregular exercise of the power, shall have his remedy in damages against the person exercising the power."

It is contended on behalf of the plaintiff-respondent that the plea taken by the defendants amounts to saying that there had been improper or irregular exercise of the power conferred on the mortgagee under section 69 and that therefore the provisions contained in sub-section (3) quoted above would apply. The contention is that as the defendants attack the plaintiff's title only on the ground that the exercise of the power conferred on the mortgagee had been improper and irregular, their remedy is only by way of damages as contemplated under sub-section (3) and that the title itself cannot be questioned. This contention is not correct because the defendants are not attacking the sale in favour of the plaintiff on any of the three grounds mentioned in sub-section (3). On the contrary, they attack the sale as wholly invalid on the ground that the plaintiff is only an alias for the mortgagee. It cannot be disputed and as a matter of fact it is not disputed that if the mortgagee himself purchases the property under section 69 of the Transfer of Property Act, such a sale would be wholly void as a person cannot sell the property to himself. It is to be noted that under section 69, the mortgagee is given the power of sale and therefore he is the seller. He cannot possibly sell the property to himself. If any such sale is purported to be made it would be wholly void. It has been held so by this Court in *Egmore Benefit Society* v. *Aburupammal*[1]. Therefore, if the sale under section 69 is in favour of the mortgagee himself, it cannot be contended that the mortgagor cannot attack the title of the purchaser. Sub-section (3) of section 69 would not be a bar against the mortgagor questioning the title in such a sale. But what is contended on behalf of the plaintiff is that in the present case the mortgagee himself has not purchased the property and that the plea of the defendant is only that the plaintiff is a nominee of the mortgagee. In the present appeal and the revision petition, I am not concerned with the question whether the plaintiff is really a nominee of the mortgagee or not. That is a matter which has still to be investigated. It is quite possible that the defence taken by the defendants that the plaintiff is only a nominee of the mortgagee is not factually sustainable, but as I said, that is not a

1. (1943) 1 M.L.J. 92 : A.I.R. 1942 Mad. 301.

matter to be considered in the present appeal and the revision petition. The question is whether the Court below is right in shutting out cross-examination by the defendants on the above question. I am quite clear that the defence taken by the defendants is not one covered by sub-section (3) of section 69. It cannot be legitimately contended that that plea amounts to saying that the exercise of power by the mortgagee had been done improperly or irregularly. If really the plaintiff is a nominee of the mortgagee, he does not stand on any different footing than the mortgagee himself. Regarding the present question it does not matter whether the sale is in the name of the mortgagee himself or in the name of his nominee. If the mortgagee cannot effect a valid sale in his own favour, by merely putting up his nominee, the position would not be different. Therefore, if really the plaintiff is a nominee of the mortgagee, the sale would be *ab initio* void. It is not a mere improper or irregular exercise of the power of sale as sought to be made out by the plaintiff. The decision reported in *Govindaswami Naicker* v. *Pukhraj Sowcar*[1] relied on by the Court below does not cover the present question.

8. The result is the appeal and the revision petition are allowed. The decree and judgment are set aside and the suit is remitted back to the trial Court for fresh disposal according to law and in the light of the observations above. The Court-fee paid on the appeal memorandum shall be refunded to the appellants. No costs in the appeal as well as the revision petition. The suit being very old, it should be disposed of by the trial Court within two months from this date.

S.J. —— *Appeal and Petition allowed.*

1. (1940) M.W.N. 772: (1940) 2 M.L.J. 281: A.I.R. 1940 Mad. 903.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*N. S. Ramaswami, J.*

Mrs. Nainammal Bibi ... *Appellant**

v.

Mrs. Umma Habiba Bibi .. *Respondent.*

Tamil Nadu Building (Lease and Rent Control) Act (XVIII of 1960), section 10 (1)—Suit for eviction in Civil Court—Question of title—Whether to be decided before entertaining plea for eviction.

There is nothing in the language of the second proviso to section 10 (1) of Act XVIII of 1960 to show that the Civil Court before entertaining a plea for eviction should necessarily decide the question of title. [*Para.* 5.]

Cases referred to:—

Sanjeevi Naidu v. *Chittibabu Mudaliar*, (1953) 1 M.L.J. 260 : 1953 M.W.N. 39: A.I.R. 1953 Mad. 473; *Krishna Prasad Lal* v. *B.C. Concern Ltd.*, (1937) 2 M.L.J. 286 : 64 I.A. 311: 64. L.W. 201; A.I.R. 1937 P.C. 251 : *Muhammad Hussain* v. *Abdul Gaffoor*, (1945) 1 M.L.J. 475 : I.L.R. (1946) Mad. 44 : 58 L.W. 200 : A.I.R. 1945 Mad. 321: *Union of India* v. *Nanak Singh*, (1968) 2 S.C.R. 887: (1968) 2 S.C.J. 881 :(1968)2 S.C.W.R. 889: A.I.R. 1968 S.C. 1370.

Appeal against the decree of the City Civil Court, Madras in Original Suit No. 3776 of 1967.

S.K. Ahmed Meeran, A. Abdul Hadi and *P.B. Sundararaman*, for Appellant.

M. Sundaram and *V. Narayanaswamy*, for Respondent.

The Court delivered the following

JUDGMENT.—The first defendant is the appellant. The suit out of which this appeal arises is one in ejectment and for recovery of damages for use and occupation. The suit property which is a land

* Appeal No. 450 of 1969.

18th November, 1974

with building was originally owned by Khader Masthan and Mohideen Masthan who are brothers. Both of them are dead. Mohamed Hanifa, the son of Khader Masthan had leased out the property to the first defendant on a monthly rent of Rs. 100. Defendants 2 to 11 are in possession of portions of the property as sub-lessees under the first defendant.

2. Subsequently the heirs of Khader Masthan and Mohideen Masthan including the abovesaid Mohamed Hanifa who had leased out the property to the first defendant sold the property to the plaintiff under Exhibit A-1 dated 17th February, 1966. The vendors have issued a notice as per Exhibit B-5 dated 19th February, 1966 to the first defendant intimating about the abovesaid sale of the property to the plaintiff. The plaintiff herself issued a notice, Exhibit B-4, dated 21st February, 1966 intimating the first defendant about her purchase of the property. Further correspondence followed. In the meanwhile, that is on 7th March, 1966 and 31st March, 1966, the first defendant took two sale deeds from some of the heirs of the abovesaid Khader Masthan and Mohideen Masthan and under each of the sale deeds, a 13/96 share is said to be conveyed to the first defendant by those heirs. By virtue of these two sale deeds, the first defendant claimed that he had become the owner of 13/48 share in the property and that the plaintiff cannot claim ownership to the entire property. Ultimately, the plaintiff issued the notice Exhibit B-8 dated 22nd March, 1966 terminating the tenancy and calling upon the first defendant to vacate with effect from 31st May, 1966. This was followed up by a petition for eviction in the Rent Control Court. H.R.C. No. 3992 of 1966 is the petition filed by the plaintiff for eviction on three grounds, namely (1) wilful default in payment of rent (2) subletting the premises without the written consent of the landlord and (3) the landlord requiring the premises for her own occupation. In that petition the first defendant denied the petitioner's (Plaintiff's) title to the property. The Rent Controller recorded a finding that the denial of title made by the first defendant is *bona fide*. By virtue of the second proviso to section 10 (1) of Act XVIII of 1960 once the Rent Controller records a finding that there is a *bona fide* denial of title, then the ordinary Civil Court would get jurisdiction to evict the tenant provided any one of the grounds under the Rent Control Act is made out. It is by virtue of the said proviso, the suit out of which this appeal arises had been filed. The plaintiff claimed possession of the property and also arrears of rent at the rate of Rs. 100 per month upto 31st May, 1966 as well as damages for use and occupation at the rate of Rs. 300 per month from 1st June, 1966 onwards.

3. The first defendant raised various contentions and a number of issues had been raised before the trial Court. The question whether the first defendant had become a co-owner of the suit property by virtue of the sale deeds Exhibits B-2 and B-3 in her favour and on that score the plaintiff should be non-suited had been raised but that had not been pressed before the lower Court. After negativing the other contentions raised by the first defendant the Court below decreed the suit but did not agree with the plaintiff that she is entitled to damages for use and occupation at the rate of Rs. 300 per month from 31st May, 1966. The Court has held that the plaintiff is entitled to recover only rent at the rate of Rs. 100 per mensem right from the date of Exhibit A-1, the sale in favour of the plaintiff till date of delivery of possession. The plaintiff has not filed any appeal or cross-objections regarding the damages for use and occupation claimed by her.

4. Three contentions were raised by the learned Counsel for the first defendant (appellant) in this appeal. The first is that the Court below should have necessarily gone into the question of title to the property before ever it entertained the plea whether the plaintiff is entitled to possession of the entire suit property. It is contended that once the Rent Controller holds that there is a *bona fide* dispute regarding title then the Civil Court cannot order eviction without deciding the question of title. The second contention raised is that the Court below ought to have held that there was no relationship of landlord and tenant between the plaintiff and the first defendant. Thirdly it is contended that in any event the plaintiff would not be entitled to claim the entire rent of

Rs. 100 per month but only a portion of it in as much as the first defendant herself has become the owner of 13/48 share in the said property. But none of these contentions are tenable.

5. Regarding the first contention raised by the learned Counsel, the second proviso to section 10 (1) of Act XVIII of 1960 has to be noted. That is in the following terms:

> "Provided further that where the tenant denies the title of the landlord or claims right of permanent tenancy, the Controller shall decide whether the denial or claim is *bona fide* and if he records a finding to that effect, the landlord shall be entitled to sue for eviction of the tenant in a Civil Court and the Court may pass a decree for eviction on any of the grounds mentioned in the said sections, notwithstanding that the Court finds that such denial does not involve forfeiture of the lease or that the claim is unfounded."

In considering the effect of the second proviso to section 7 (1) of Act XXV of 1949 which corresponds to the present provision, a Division Bench of this Court in *Sanjeevi Naidu* v. *Chittibabu Mudaliar*[1] at pages 261 and 262 observed:

> "That proviso contemplates first a petition before the Rent Controller himself for eviction and a denial of title in such proceeding. If the Controller decides that the denial of title is *bona fide* and records a finding to that effect then the landlord would be entitled to sue for eviction of the tenant in a Civil Court. But even here the decree for eviction can only be passed on any of the grounds mentioned in section 7.
>
> * * * *
>
> The effect of the proviso is that even if a Civil Court finds that the claim of the tenant is not well-founded, the tenant can be evicted only on any of the grounds mentioned in section 7. In other words, even when the tenant has denied the title of the landlord and his denial has been found to be without foundation, he will be entitled to the benefits of section 7 (2)".

From the language of the proviso itself, it is quite clear that the civil suit contemplated is only to be in a different form (than the Rent Control Court) and even in such a suit (if it is based on tenancy) eviction can be ordered only as per the provisions of the Rent Control Act and not otherwise. The present suit is clearly one contemplated by the abovesaid proviso. As already seen the Rent Control Court has recorded a finding that the denial of title is *bona fide*.

Once the rent Controller records a finding that the denial of title is *bona fide*, the Civil Court has jurisdiction to entertain a suit for eviction, but it can order eviction only on any of the grounds enumerated in the provisions of the Rent Control Act. In the present case, it is not the contention on behalf of the first defendant that none of the grounds mentioned in section 10 (2) of Act XVIII of 1960 has been made out and that therefore the Civil Court ought not to have ordered eviction. As I said, the contention is that the Civil Court should necessarily have gone into the question of title before ever it entertained the plea of eviction. But in the language of the proviso to section 10 (1) referred above, there is nothing to show that the Civil Court before entertaining the plea for eviction should necessarily decide the question of title. As the proviso contemplates an order of eviction being passed by the Civil Court on any of the grounds available before the Rent Controller, it necessarily follows that the suit contemplated is one based on tenancy. Therefore it is not right to contend that once the Rent Controller has given a finding that there is *bona fide* dispute regarding title, the suit should be one on title and not merely on tenancy. As a matter of fact it had been conceded in the Court below that the question of title need not be gone into and that the only question to be decided was whether the relationship of landlord and tenant existed between the plaintiff and the first defendant. Because of the abovesaid concession, the issues relating to the question of title had not been decided. As a matter of fact by consent of parties the issues came to be deleted. Therefore it is not now open to the first defendant to contend that the suit ought to have been based on title and the Court

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1. (1953) 1 M.L.J. 260 : 1953 M.W.N. 39 : A.I.R. 1953 Mad. 473.

below ought to have given a finding regarding title before ever it entertained the plea of eviction.

6. Therefore, the real question is whether the relationship of landlord and tenant existed between the plaintiff and the first defendant. In this case, the original lessor was Mohamed Hanifa, even though he was only one of the sharers of the property. Admittedly, the first defendant had been paying rent only to Mohamed Hanifa and the said Mohamed Hanifa along with other sharers has executed a sale to the plaintiff under Exhibit A-1 dated 17th February 1966. It is stated that the persons who purported to convey some shares in the property to the first defendant under Exhibits B-2 and B-3 did not have any such share on the relevant date by virtue of the partition that took place amongst the various sharers. Exhibits A-5 and A-6 are two partition deeds of the same date, namely 7th December, 1957 under which the heirs of Khader Masthan and Mohideen Masthan had partitioned their property including the suit property. It is stated that as per the terms of the abovesaid two partition deeds, the persons who purported to convey some shares to the first defendant under Exhibits B-2 and B-3 had taken some other property and after the said partition they had no interest at all in the suit property. But it is not necessary to go into this aspect as the question of title is not being decided in this suit. What is relevant to be noticed is that the original lessor was Mohamed Hanifa as it was to him the first defendant. had been paying rents and this Mohamed Hanifa along with other sharers had sold the property to the plaintiff under Exhibit A-1.

7. Under section 116 of the Indian Evidence Act, no tenant of immovable property can, during the continuance of the tenancy deny that the landlord had at the beginning of the tenancy a title to such immovable property. It has been pointed out by the Privy Council in *Krishna Prasad Lal* v. *B.C. Concern Ltd.*[1], that the tenancy does not begin afresh every time the interest of the landlord (or of the tenant) devolves upon a new individual by succession or assignment and that even in a case where the original lessor has transferred his interest to another, the tenant is not free from the estoppel imposed by section 116 of the Indian Evidence Act. Mr. Ahmed Meeran, learned counsel for the first defendant (appellant) referring to the decision reported in *Muhammad Hussain* v. *Abdul Gaffoor*[1], contended that the estoppel under section 116 of the Evidence Act would not be applicable to the present case. But he is not right. That was a case where the plaintiff along with two others had taken a lease of certain property and subsequently the plaintiff purchased the shares of two out of the three co-owners of the suit property and sued the remaining sharers for partition of the property even before the lease of the property had expired. It was contended that by virtue of section 116 of the Evidence Act such a suit was not maintainable. The said contention was rejected and the Division Bench pointed out that the plea of estoppel under section 116 of the Evidence Act was not applicable as the question raised between the parties, arose not in the relationship of landlord and tenant but of vendor and purchaser. The present case is based only on tenancy as already seen. Therefore the abovesaid Bench decision of this Court would have no application.

8. Under section 109 of the Transfer of Property Act if the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee in the absence of a contract to the contrary shall possess all the rights of the transferor. Therefore, even if the plaintiff has not become the owner of the entire property, but she obtained title only to a part of the interest of the lessor by virtue of the sale deed, Exhibit A-1, she is entitled to all the rights of the lessor. The plaintiff, as the successor-in-interest of the lessor would undoubtedly be entitled to sue for possession of the property. Under such circumstances, it is not open to the first defendant to contend that no relationship of landlord and tenant existed between the plaintiff and herself and that therefore the suit in ejectment should fail.

1. (1937) 2 M.L.J. 286 : 64 I.A. 311 : 46 L.W. 201 : A.I.R. 1937 P.C. 251.

1. (1945) 1 M.L.J. 475 : I.L.R. (1946) Mad. 44 : A.I.R. 1945 Mad. 321 : 58 LW. 200.

9. The learned Counsel contends that the plaintiff is barred by the principles of *res judicata* from contending that the relationship of landlord and tenant existed between her and the first defendant. It is stated that the Rent Controller while disposing of H.R.C. No. 3992 of 1966 has recorded a finding that no relationship of landlord and tenant existed between the parties. It is claimed that that finding operates as *res judicata* against the plaintiff now contending that he is the lessor and the first defendant is the lessee in respect of the premises. In this connection the learned Gounsel referred to *Union of India* v. *Nanak Singh*[1], which is a case where the plaintiff had originally filed a writ petition challenging the termination of his temporary service on grounds of infringement of Article 311 of the Constitution and the competence of the authority ordering termination. The petition came to be dismissed. After that he filed a suit in the civil Court. It was held by the Supreme Court as seen from the headnote which brings out the point correctly:—

> " Provisions of section 11, Civil Procedure Code, are not exclusive with respect to an earlier decision operating as *res judicata* between the same parties on the same matter in controversy in a subsequent regular suit and on the general principle of *res judicata* any previous decision on a matter in controversy, decided after full contest or after affording fair opportunity to the parties to prove their case by a Court competent to decide it, will operate as *res judicata* in a subsequent regular suit. It is not necessary that the Court deciding the matter formerly should be competent to decide the subsequent suit or that the former proceeding and the subsequent suit should have the same subject-matter. There is no good reason to preclude such decisions on matters in controversy in writ proceedings under Article 226 or Article 32 of the Constitution from operating as *res judicata* in subsequent regular suits on the same matters in controversy between the same parties and thus to give limited effect to the principle of the finality of decisions after full contest."

10. In the present case, assuming that the Rent Controller has held that in H.R.C. No. 3992 of 1966 that no relationship of landlord and tenant existed between the parties, I am of the view that in the circumstances of the case, he was not competent to decide that question. It must be remembered that the denial of title made by the tenant was *bona fide*. As already seen, the second proviso to section 10 (1) of Act XVIII of 1960 says that once such a finding is recorded, the landlord will be entitled to sue for eviction of the tenant in a civil Court. The Rent Controller having asked under the abovesaid proviso and recorded the finding that there was a *bona fide* dispute regarding title, he had no jurisdiction to go into the question whether the relationship of landlord and tenant did exist or not. This is a matter which has to be decided only by the Civil Court as and when the landlord filed the suit for eviction by virtue of the abovesaid proviso. The observation of the Rent Controller regarding this aspect occurs after he recorded the finding that the denial of title was *bona fide*. The only sentence is as follows :

> " Further, there is nothing on record to show that the petitioner substantiated the relationship of landlord and tenant between herself and the respondent after she became the owner of the petition premises."

The above sentence in the order of the Rent Controller is really in the nature of an observation and not a finding. All that the Rent Controller appears to say is that after the plaintiff (petitioner before him) had purchased the property, there was no fresh lease agreement and the first defendant (respondent before him) had not recognised the plaintiff as the landlord. This cannot be stated to be a clear finding that no relationship of landlord and tenant existed between the plaintiff and the first defendant. As a matter of fact it had not been contended before the trial Court that the Rent Controller had given a finding that no relationship of landlord and tenant existed between the parties and that finding operates as *res judicata*.

1. (1968) 2 S.C.R. 887 : (1968) 2 S.C.J. 881 : (1968) 2 S.C.W.R. 889 : A.I.R. 1968 S.C. 1370.

11. The last contention is regarding the question whether the plaintiff is entitled to collect the entire rent of Rs. 100 per month or only a portion thereof. It is contended on behalf of the first defendant, by virtue of section 37 and the last para. of section 109, Transfer of Property Act, that the plaintiff can claim only proportionate rent and not the entirety inasmuch as Exhibit A-1 did not convey title to the entire property though it purported to do so. But in view of the fact that the first defendant had taken the position before the trial Court that the question of title need not be gone into, it has to be taken that as far as these proceedings are concerned the plaintiff became entitled to collect the entire rent due from the tenant.

12. The appeal fails and the same is dismissed with costs.

S.J. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*N. S. Ramaswami, J.*

R. Dharmarajan .. *Appellant**

v.

Nagalinga Kandiar and another .. *Respondents.*

(A) *Madras Agriculturists Relief Act (IV of* 1938), *section* 23-C—*Money decree on* 27*th October,* 1971—*Property sold in execution on* 19*th September,* 1973—*Sale confirmed on* 31*st October,* 1973—*Application to set aside sale on* 21*st January,* 1974.

(B) *Tamil Nadu Agriculturists Relief (Amendment) Act,* 1972 (*VIII of* 1973)—*Gazette publication on* 24*th January,* 1973—*Provisions of the Act whether applicable.*

A reading of section 23-C of the Madras Agriculturists Relief Act as a whole leaves no room to doubt that it applies only to sales held after first March, 1972, but before the publication of Act VIII of 1973. The first part of section 23 (c) states that the sale has to be after the first March, 1972 and the same should not have been confirmed before the publication of Act VIII of 1973 or ninety days have not elapsed from the confirmation of the sale or from the foreclosure at such publication. This clearly indicates that the sale which is sought to be set aside should have taken place prior to the publication of Act VIII of 1973. Then only the question of the sale not having been confirmed before the publication of the Act or ninety days having not elapsed from such confirmation would arise. The judgment-debtor's remedy in case of a decree passed prior to the publication of Act VIII of 1973 is to apply to the Court which passed the decree to scale down the decree under section 19 of the Act.

[*Paras.* 3 *and* 4.]

Case referred to :—

D. Ramakotayya v. *Y. Nagireddi,* (1957) An.L.T. 26; (1957) 1 An.W.R. 142.

Appeal against the order of the Court of the District Munsif of Pattukottai, dated 23rd January, 1974 and made in E. P. No. 71 of 1973 in O. S. No. 42 of 1971.

S. Balasubramaniam, for Appellant.

R. N. Kothandaraman, for Respondents.

The Court made the following

ORDER.—The question in this civil miscellaneous appeal is whether section 23-C of Act IV of 1938 hereinafter referred to as the Act is applicable to an execution sale which took place after the commencement of the Tamil Nadu Agriculturists Relief (Amendment) Act 1972 herein after referred to as Act VIII of 1973. The money decree was passed on 27th October, 1971. In pursuance of the decree execution was taken and the property was sold on 19th September, 1973. It had been confirmed on 31st October, 1973. The application for setting aside the sale purporting to be under section 23-C of the Act was filed on 21st January, 1974. The executing Court has dismissed the application holding that the said provision does not apply to a sale which took place after the publication of Act VIII of 1973. The said Act namely Act VIII of 1973, had been published in the Tamil Nadu Government Gazette on 24th January, 1973. Therefore the Court sale itself

* A.A.O. No. 149 of 1974.

22nd November, 1974.

was very much subsequent to the publication of the said Act.

2. It is contended on behalf of the judgment-debtor, who is the appellant before me, that a proper reading of section 23-C would make it applicable even to a sale which was held after the publication of Act VIII of 1973. The learned counsel stressed the latter part of section 23-C which prescribes the period within which the application can be made. It is pointed out that under that part of the section an application can be made within 90 days of the publication of Act VIII of 1973 or of the confirmation of the sale which ever is later and that the application in the present case being within 90 days of the date of the confirmation of the sale, though not within 90 days from the date of publication of Act VIII of 1973, the application has to be entertained.

3. A reading of section 23-C as a whole leaves no room to doubt that it applies only to sales held after first March, 1972 but before the publication of Act VIII of 1973. The relevant part of the section is as follows :—

> "Where in execution of any decree, any immovable property in which any person entitled to the benefits of the Tamil Nadu Agriculturists Relief (Amendment) Act, 1972, had an interest, has been sold or fore-closed on or after the 1st March, 1972, and the sale has not been confirmed before the publication of the said Act in the Tamil Nadu Government Gazette, or ninety days have not elapsed from the confirmation of the sale or from the foreclosure at such publication............and notwithstanding that the sale has been confirmed, any judgment-debtor claiming to be entitled to the benefits of the said Act, may apply to the Court within ninety days of such publication or of the confirmation of the sale, whichever is later, to set aside the sale or foreclosure of the property......"

It is significant to note that in the first part of the section it is stated that the sale has to be after the first March, 1972 and the same should not have been confirmed before the publication of Act VIII of 1973 or ninety days have not elapsed from the confirmation of the sale or from the foreclosure at such publication. This clearly indicates that the sale which is sought to be set aside should have taken place prior to the publication of Act VIII of 1973. Then only the question of the sale not having been confirmed before the publication of the said Act or ninety days having not elapsed from such confirmation would arise. In the present case the sale itself had been held in September, 1973 that is about 8 months after the publication of Act VIII of 1973.

4. The judgment-debtor's remedy in the case of a decree as in the present case was to apply to the Court which passed the decree to scale down the decree under section 19 of the Act. It is not in dispute that after the decree when the decree-holder took out execution the judgment-debtor had been taking part in the proceedings and he had been paying parts of the decree amount. He had not availed of the provision contained in section 19 of the Act in getting the decree scaled down. Having failed to do so it is not open to him to file an application under section 23-C for having the sale set aside, when the sale itself is very much after the publication of Act VIII of 1973.

5. The only direct authority brought to my notice is one rendered by the Andhra High Court, in *D. Ramakotayya* v. *Y. Nagireddi*[1], in respect of section 23-A of the Act. In that provision also there is a similar clause as in section 23-C. It is stated therein that an application for setting aside the sale can be made in respect of a sale held "on or after the 30th September, 1947 and the sale has not been confirmed before the commencement of the said Act, or ninety days have not elapsed from the confirmation of the sale or from the foreclosure, at such commencement." The Act referred to therein is the amendment Act of 1948. In interpreting that clause Viswanatha Sastri, J., has held that the reference to the confirmation of the sale brefore the commencement of the Act or within 90 days of such commencement, indicates that it was only sales held before the Act that were within the contemplation of the Legislature. I respectfully agree with the above view.

1. (1957) An.L.T. 26 : (1957) 1 An.W.R. 142.

6. This civil miscellaneous appeal therefore fails and the same is dismissed. There will be no order as to costs.

R.S. ——— *Appeal dismissed.*

[FULL BENCH]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*K. Veeraswami C. J., S. Natarajan and Sethuraman, JJ.*

The Chief Controlling Revenue Authority, Board of Revenue, Madras-5. .. *Petitioner**

v.

M. Hamid Sultan .. *Respondent.*

Stamp Act (II of 1899), section 57—Document—Article under which chargeable—Conveyance or release deed—Document to be looked into—Benami transaction—Tests applied.

When a question arises under which Article a document should be chargeable, the first thing to be looked into is the document itself in order to determine the character thereof.

On a qusetion whether a given transaction is a benami transaction, which is familiar in our country, usually the tests applied are source of purchase money, custody of title deeds, possession and payment of kists. [*Para.* 2.]

Case referred to the High Court by the Chief Controlling Revenue Authority, Board of Revenue, Madras, under section 57 of the Indian Stamp Act of 1899 for decision on the following question of law namely : "Whether in the circumstances and facts of the case the document dated 16th February, 1968, (Document No. P/68 of Sub Registrar's office, Thiruvidaimaruthur executed by Mumtaz Begam in favour of the husband the Respondent herein styled as "Release deed" should be termed a 'conveyance' which attracts duty under Article 23 in the Schedule 1 to the Stamp Act."

V. Manivannan, Additional Government Pleader, for Petitioner.

A. R. Ramachandran, for Respondent.

The Judgment of the Court was delivered by

K. Veeraswami, C.J.—This is a reference under section 57 of the Stamp Act, the question being whether in the circumstances and facts of the case, the document dated 16th February, 1968 executed by one Mumtaz Begum in favour of her husband styled as a release deed should be stamped as a conveyance under the Stamp Act.

2. When a question arises under which Article a document should be chageable, the first thing to be looked into is the document itself in order to determine the character thereof. The deeds covering the properties were in the name of the wife. But the wife admitted in the recitals that the entire consideration for the sale in her favour proceeded from her husband, and that she was only a name lender. Also, it is significant that there is a recital that the documents were with the husband. On a question whether a given transaction is a benami transaction, which is familiar in our country, usually the tests applied are source of purchase money, custody of title deeds, possession and payment of kists. In the instant case, the consideration, as admitted by the wife, has proceeded from the husband. Section 82 of the Indian Trusts Act says that where property is tranferred to one person for a consideration paid or provided by another person and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration. The effect of this provision is that, until the contrary intention is established by the claimant who has paid the money, the transfer shall be taken to be a real one and in favour of the transferee. In the instant one, the wife herself admits that the intention of advancement by the husband of the money for purchase of the two properties was not to benefit her at all. So, the proof required to establish the contrary intention contemplated under section 82 is present in his case. Also, there is further evidence in the document itself that the title deeds were with

* R.C. No. 2 of 1970.

14th October, 1974.

the husband himself. Both had also executed a mortgage deed on the very same property and the recital is that after the release deed the husband should clear the debts. In the circumstances, we hold that the document will attract duty on a release deed and not as a conveyance.

3. The question referred to us is answered against the Revenue with costs. Counsel's fee Rs. 250.

S.J. —— *Question answered against Revenue.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :— *T. Ramaprasada Rao, J.*

Neela Bai Ammal .. *Appellant**

Krishnaveni Ammal .. *Respondent.*

Civil Procedure Code (V of 1908), Order 38, Rule 5 and 11—Attachment before Judgment —Decree obtained—Execution—Settlement deed effected—Effect of attachment before judgment.

Reading (O. 38, R.5 with O.38, R.11, C.P.C.) together, it is clear that an attachment before judgment effected pursuant to an order made under O.38, R.5 subsists, and its effect is not in any way impeded or lessened by the supervening obtaining of a decree by the plaintiff in the very proceedings, and thereafter. It, therefore, follows that an order made under O.38, R.5 is effective even for purposes of the execution of the decree subsequently obtained by the plaintiff.

[*Para.* 3.]

Case referred to :—

Kuppuswami v. *Rangai Goundan*, (1962) 2 M.L.J. 132 : 75 L.W. 144 : A.I.R. 1962 Mad. 383.

Petition under section 115 of Act V of 1908, praying the High Court to revise the Order of the Court of the Additional District Munsif I, Poonamallee dated 22nd October, 1973 and made in Execution Application No. 175 of 1972 in E. P. No. 883 of 1971 in M.C.C.O.S. No. 291 of 1970.

* C.R.P. No. 141 of 1974.

6th September, 1974.

A.V. Dhanakoti, for Appellant.

S. Padmanabhan, for *R. Nadanasabapathy* and *R. Thamodaran,* for Respondent.

The Court made the following

ORDER :—The civil revision petition has to be allowed.

2. The decree-holder is the petitioner. She obtained a decree in the City Civil Court, Madras, in O. S. No. 291 of 1970. But prior to the said decree date, she had filed an application for attachment before judgment of the defendant's property and on 20th January, 1970 such an attachment was ordered, as seen from Exhibit B-4, and was effected on 22nd April, 1970, as seen from Exhibit B-5. The Court can safely presume that the attachment had been effected by reason of the said order. This was followed, as already stated, by the decree on 28th July, 1971. Thereafter, the petitioner, decree-holder sought for a transfer of the decree with the usual certificate of non-satisfaction to the Court of the District Munsif of Poonamallee. This was on 6th November, 1971. After the transfer was so effected of the decree for purposes of executing the decree, the petitioner filed E. P. No. 884 of 1971, in the transferee Court, for attachment of the same property and bringing it to sale pursuant to the money decree obtained by her in the City Civil Court. Necessary orders in the execution petition were issued on 14th December, 1971 and the attachment of the property was made on 16th December, 1971. Thereafter, the respondent, on the foot of a settlement deed effected by her husband (judgment-debtor), of the suit property on 10th June, 1970 filed a claim petition on 7th February, 1972 stating that the property cannot be deemed to be subject to attachment made by the petitioner in the above proceedings, that it ought to be held free from it and that her claim to the property as evidenced by the settlement deed, as above, should be upheld. The lower Court upheld the same. It is against this, the present Civil Revision Petition has been filed.

3. Under Order 38, rule 5 read with Order 38, rule 11, Civil Procedure Code, the purport and effect of attachment

before judgment is fully brought out. Under Order 38, rule 5, a plaintiff can file an application before the passing of a decree in his suit for the issuance of a rule by way of attachment before judgment of the property belonging to the defendant, if according to the plaintiff, the defendant is about to dispose of the whole or any part of his property or is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court. The Court, if it is satisfied that the plaintiff has shown his *bona fides* in the directions as above, may cause the attachment before judgment of the defendant's property, as provided for in Order 38, rule 5. Order 38, rule 11, provides that where the property is under attachment by virtue of the provisions of that Order meaning thereby, Order 38, rule 5 and a decree is subsequently passed in favour of the plaintiff, it shall not be necessary upon an application for execution of such decree to apply for a re-attachment of the property. Reading the above two Rules together, it is clear that the attachment before judgment effected pursuant to an order made under Order 38, rule 5, subsists, and its effect is not in any way impeded or lessened by the supervening obtaining of a decree by the plaintiff in the very proceedings, and thereafter. It, therefore, follows that an order made under Order 38, rule 5, is effective even for purposes of the execution of the decree subsequently obtained by the plaintiff.

4. Srinivasan, J., in *Kuppuswami* v. *Rangai Goundan*[1], dealing with Order 38, rules 5 and 11, Civil Procedure Code, observed that when a party suing obtains a decree against the judgment-debtor, having under rule 5 of Order 38 obtained an attachment of the property of the judgment-debtor before the passing of the decree, such attachment enures in favour of the decree-holder and before bringing the property to sale in execution of the decree it shall not be necessary for him to have the property attached again in the course of execution. This proposition being well-settled, it is for consideration whether the execution petition filed by the decree-holder subsequently in the Court of the District Munsiff of Poonamallee, which is the transferee Court, would in any way lessen the rigour and vigour of the order for attachment before judgment, which had been effected consequent upon the plaintiff obtaining such an order under Order 38, rule 5. Order 38, rule 11, is a definite pointer to the effect that such an order cannot in any way be whittled down in any manner whatsoever. This being the legal position, the fact that the decree-holder sought for a second attachment and the executing Court gave such an order for attachment and the property was in consequence attached for a second time on 16th December, 1971 does not in any way thwart the effect of the attachment before judgment obtained by the decree-holder under Order 38, rule 5, which subsists for all time and even for the definite purpose of attaching and selling the property in execution of the decree later obtained by the decree-holder after the order under Order 38, rule 5, was passed. I am of the view that the attachment made on 16th February, 1971 on the volition of the decree-holder, cannot in any way belittle the statutory effect of an attachment before judgment, which continues, under Order 38, rule 11, till the decree is satisfied. The attachment made on 16th December, 1971 pursuant to the order of the executing Court was redundant and ought to be understood as such. It has no legal impact on the effect and force of the order for attachment before judgment already obtained by the decreeholder.

5. Secondly, even on the merits, the respondent cannot succeed. The order for attachment before judgment was made on 20th January, 1970 and the attachment was effected on 22nd April, 1970 as is seen from Exhibit B-5. The ordinary presumption that official acts should be presumed to have been done in the regular course would arise in the instant case, and the decreeholder plaintiff should have seen to the implementation of that order for attachment before judgment, which he ought to have obtained after some effort. Thus importing the presumption under section 114 (*e*) of the Evidence Act, the Court

1. (1962) 2 M.L.J. 132 : 75 L.W. 144 : A.I.R. 1962 Mad. 383.

can presume that the attachment was effected on 22nd April, 1970. If, therefore, the settlement was made on 10th June, 1970 which was long after the date when the order for attachment before judgment was issued, then, it ought to be subject to the attachment already effected pursuant to orders of Court. Even on this ground, therefore, the respondent cannot succeed.

6. The Court below went on considerations which were irrelevant and went into a discussion whether section 46, Civil Procedure Code, would have any impact on the facts of this case, I find that no application under section 46, Civil Procedure Code, was made at all. The Court below went wrong in having assumed that such an application was made and in having taken up that matter for consideration in detail.

7. On an overall appreciation of the settled law on the question, I am of the view that the lower Court ought not to have allowed the claim petition.

8. The civil revision petition is allowed. There will be no order as to costs.

S.J. ——— *Petition allowed.*

[FULL BENCH]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*K. Veeraswami, C. J., S. Natarajan and Sethuraman, JJ.*

S. Vaithialingam .. *Petitioner**

v.

S. Chandrasekharan .. *Respondent.*

Madras Panchayats Act (XXX of 1958), Rules framed for decision of election disputes—Rules 6—Election petition—Dismissed for default by Election Commissoner—Application for restoration—Whether lies.

The election rules relating to decision of election disputes under the Panchayats Act do not confer power upon an Election Tribunal to dismiss an election petition for default of appearance. The election petition could and should end only by an order under rule 12 of the Rules framed for decision of election disputes except in two cases, namely: (1) where leave is granted for withdrawal; and (2) where there is the death of the sole petitioner in the election petition. [*Para.* 13.]

Cases referred to:—

Natarajan v. *State of Madras*, I.L.R. (1960) Mad. 449 : 73 L.W. 113 : (1960) 2 M.L.J. 150 ; *Koti Reddi* v. *Venkayya*, I.L.R. (1952) Mad. 104 : (1951) 1 M.L.J. 347 : 64 L.W. 301 : A.I.R. 1951 Mad. 813 ; *Harish Chandra* v. *Triloki Singh*, 1957 S.C.J. 297 : (1957) S.C.R. 370 : A.I.R. 1957 S.C. 444 ; *Waryam Singh* v. *Amarnath*, 1954 S.C.J. 290 : (1954) S.C.R. 565 : A.I.R 1954 S.C. 215 ; *Hari Vishnu* v. *Ahmed Ishaque*, 1955 S.C.J. 267 : (1955) 1 S.C.R. 1104 : (1955) 1 M.L.J. (S.C.) 157 : A.I.R. 1955 S.C. 233 ; *Nagendra Nath* v. *Commissioner of Hills Division*, (1958) S.C.J. 798 : 1958 S.C.R. 1240 ; A.I.R. 1958 S.C. 398 ; *Jijabai Vithal Rao Garire* v. *Pathankhan*, (1971) 2 S.C.J. 17 : (1971) 2 S.C.R. 1: A.I.R. 1971 S.C. 315; *The Ahmedabad Mfg. and Calico Ptg. Co. Ltd.* v. *Ramtahel Ramanand and others*. (1973) 1 S.C.R. 185: A.I.R. 1972 S.C. 1598; *Mallappa Basappa* v. *Basavaraj Ayyappa*, (1951) 1 M.L.J. 347: 64 L.W. 301: I.L.R. (1952) Mad. 104: A.I.R. 1951 Mad. 813 ; *Mallappa Basappa* v. *Basvaraj Ayyappa*, 1958 S.C.J. 953 : 1959 S.C.R. 611: (1958) 2 An.R.W. (S.C.) 155: (1958) 2 M.L.J. (S.C.) 155: A.I.R. 1958 S.C. 698.

M. Srinivasan, for Petitioner.

B. Soundarapandian, R. Balasubramanian and *K. Venkatasubbaraju*, for Respondent.

The Court made the following

ORDER.—(Mr. Justice Kailasam made the following Order (3-10-72) of reference to a Full Bench. This petition is filed against the order of the Election Commissioner dismissing the application of the petitioner under Order 9, rule 9, Civil Procedure Code, to restore the election petition which was dismissed for default. The Election Commissioner held that Order 9, rule 9, Civil Procedure Code, is not applicable to the Election Court, and therefore he cannot restore the petition wihch was dismissed for default.

2. The learned counsel for the petitioner submitted that all Tribunals when they exercise judicial functions should be held

* C.R.P. No. 511 of 1972.

30th October, 1974.

to possess inherent powers to review their judgments where due cause is shown. In order to answer the question whether an Election Court has got powers under the Panchayats Act to restore a petition which was dismissed for default, the relevant provisions have to be considered. Rule 6, relating to the decision of Election Disputes relating to panchayats, which is relevant runs as follows :

"6 (1) Every Election petition shall be enquired into by the Election Court as nearly as may be in accordance with the procedure applicable under the Civil Procedure Code, 1908, to the trial of suits:

Provided that it shall only be necessary for the Election Court to make a memorandum of the substance of the evidence of any witness examined by it.

(2) The Election Court shall have the powers which are vested in a Court under the Civil Procedure Code, 1908, when trying a suit, in respect of the following matter :—

(*a*) discovery and inspection;

(*b*) enforcing the attendance of witnesses and requiring the deposit of their expenses;

(*c*) compelling the production of documents ;

(*d*) examining witness on oath;

(*e*) reception of evidence taken on affidavit; and

(*f*) issuing commissions for examination of witnesses, and may summon and examine *suo motu* any person.

whose evidence appears to it to be material."

The contention on behalf of the petitioner is that under rule 6 (1), above, the Election Court is empowered to enquire into an election petition as nearly as may be in accordance with the procedure applicable under the Civil Procedure Code, to the trial of suits, and that rule 6 (2), provides that the Election Court shall have powers which are vested in a Court under the Civil Procedure Code, when trying a suit, inrespect of matters enumerated in clauses (*a*) to (*f*) above. While the contention on behalf of the petitioner is that the general power conferred under rule 6 (1), is not in any way restricted by rule 6 (2), where clauses (*a*) to (*f*) are enumerated, the contention of the respondent is that rule 6 (2) enumerates the powers that are to be exercised under rule 6 (1), and therefore rule 6 (2) is restrictive of the general power conferred under rule 6 (1). The learned counsel for the petitioner relied on a decision of a Bench of this Court in *Natarajan* v. *State of Madras*[1], where in dealing with the powers of a Tribunal constituted under the Madras Estates (Abolition and Conversion into Ryotwari) Act and the Madras Estates Land (Reduction of Rent) Act, it was held that the Tribunal had the right to review its own decision. The Rules under the Madras Estates (Abolition and Conversion into Ryotwari) Act are more or less similar to the Rules framed under the Panchayat Act relating to the election Rule 2 of the Rules framed under the Madras Estates (Abolition and Conversion into Ryotwari) Act as per notification dated 7th January, 1950 (as subsequently amended) is :

"Every Tribunal constituted under section 8 (*i*) and every special Tribunal constituted under section 51 (*i*) of the Act shall have all the powers exercisable by a civil Court in the trial of suits and in appeals."

Rule 2 runs thus :

"The proceedings of a Tribunal shall be summary and shall be governed as far as practicable by the provisions of the Civil Procedure Code, 1908, particularly in regard to :

(*a*) the issue and service of summons ;

(*b*) the examination of parties and witnesses ;

(*c*) the production of documents ;

(*d*) the payment of compensation or any other money to one person on behalf of another under disability and in particular to a guardian on behalf of a minor ; and

(*e*) the passing of orders."

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1. I.L.R. (1960) Mad. 449 : 73 L.W. 113 : (1960) 2 M.L.J. 150.

3. The learned counsel for the respondent strongly relied on a decision of a Bench of this Court in *Koti Reddi* v. *Venkayya*[1], which related to an election dispute. The point that fell to be determined was whether the Election Court had power to set aside its own orders either by way of review or by way of an application under Order 9, Civil Procedure Code. After referring to rule 6 of the Rules which provided that every election petition shall be enquired into by the Election Commissioner as nearly as may be in accordance with the procedure applicable under the Civil Procedure Code 1908, to the trial of suits, the Bench held that though no doubt R. 6 rendered the procedure under the Civil Procedure Code, to the trial of suits applicable also to the enquiry of election petitions, they were not prepared to hold that the provisions of the Civil Procedure Code which deal with matters arising after the final disposal of the suit would also apply to an election petition. The Bench further held that the Election Commissioner will not have the right to set aside a final order on the ground that one of the parties was prevented by sufficient cause from taking part in the trial of the election petition. It is unfortunate that this decision, *Koti Reddi* v. *Venkayya*[1], was not brought to the notice of the Bench which decided *Natarajan* v. *State of Madras*[2]. It is difficult to reconcile both the decisions.

4. Mr. Srinivasan, learned counsel for the petitioner, also cited a decision of the Supreme Court in *Harish Chandra* v. *Triloki Singh*[3]. In that case, the Supreme Court was dealing with the powers of the Election Tribunal under the Representation of the People Act, 1951. In dealing with section 90 (2) which provided that subject to the provisions of that Act and of any rules made thereunder, every election petition shall be tried by the Tribunal, as nearly as may be in accordance with the procedure applicable under the Civil Procedure Code, 1908, to the trial of suits, and section 92 which defined the powers of the Tribunal by stating that the Tribunal shall have powers which are vested in a Court under the Civil Procedure Code, 1908, when trying a suit in respect of matters which are enumerated in Clauses (*a*) to (*g*) therein, the Supreme Court held that the power of the Tribunal under section 90 (2) to try an election petition in accordance with the provisions of the Civil Procedure Code, was only subject to the provisions of the Act (Representation of the People Act, 1951) and the rules made thereunder, while the power under section 92 was an overriding one in that it was not subject to the provisions of the Act or the rules made thereunder. The Supreme Court was of the view that the Election Tribunal had power under Order 6, rule 17, Civil Procedure Code, to allow an amendment of the election petition. This decision of the Supreme Court would support the contention of the learned counsel for the petitioner. After this decision of the Supreme Court, the decision in *Koti Reddi* v. *Venkayya*[1], may not be good law.

5. As there is a conflict of views between two Benches of this Court, that is, the Bench which decided *Koti Reddi* v. *Venkayya*[1], and the Bench which decided *Natarajan* v. *State of Madras*[2], and as the decision in *Koti Reddi* v. *Venkayya*[1], has to be reconsidered in view of the subsequent decision of the Supreme Court in *Harish Chandra* v. *Triloki Singh*[3], and as this question is of considerable importance, it is necessary that the papers should be placed before the Hon'ble Chief Justice for orders as to reference to a Full Bench.

6. One other contention that was raised may also be disposed of. It was submitted that the power under Article 227 of the Constitution of India is restricted and that a dispute of the nature as has arisen in this petition cannot be dealt with by the High Court. I am unable to accept this contention, for it has been held that the powers of the High Court under Article 227 of the Constitution of India relate not only to right of administrative superin-

1. I.L.R. (1952) Mad. 104 : (1951) 1 M.L.J. 347 : 64 L.W. 301 : A.I.R. 1951 Mad. 813.
2. I.L.R. (1960) Mad. 449 : 73 L.W. 113 : (1960) 2 M.L.J. 150.
3. 1957 S.C.J. 297 : 1957 S.C.R. 370 : A.I.R. 1957 S.C. 444.

1. I.L.R. (1952) Mad. 104: (1951) 1 M.L.J. 347: 64 L.W. 301: A.I.R. 1951 Mad. 813.
2. I.L.R. (1960) Mad. 449 : 73 L.W. 113 : (1960) 2 M.L.J. 150.
3. 1957 S.C.J. 297: 1957 S.C.R. 370: A.I.R. 1957 S.C. 444.

tendence but also to judicial superintendence. In *Waryam Singh* v. *Amarnath*[1], the Supreme Court held that Article 227 restored to the High Court the power of judicial superintendence it had under section 15 of the High Courts' Act and section 107 of the Government of India Act, 1915, but cautioned that the power of superintendence should be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting more errors. In *Hari Vishnu* v. *Ahmed Ishaque*[2], after referring to *Waryam Singh* v. *Amarnath*[1], and confirming that the High Court's power of judicial superintendence was restored, observed:

> "It may also be noted that while in a *certiorari* under Article 226 the High Court can only annul the decision of the Tribunal, it can, under Article 227, do that, and also issue further directions in the matter."

In *Nagendra Nath* v. *Commissioner of Hills Division*[3], after referring to *Waryam Singh* v. *Amarnath*[1], the Supreme Court held:

> "It is clear that the powers of judicial interference under Article 227 of the Constitution with orders of judicial or quasi-judicial nature, are not greater than the powers under Article 226 of the Constitution. Under Article 226 the power of interference may extend to quashing an impugned order on the ground of a mistake apparent on the face of the record. But under Article 227 of the Constitution, the power of interference is limited to seeing that the tribunal functions within the limits of its authority."

The Supreme Court has also in *Jijabai Vithal Rao Garire* v. *Pathankhan and others*[4] and in *The Ahmedabad Mfs. and Calico Ptg. Co. Limited* v. *Ramtabel Ramanad and others*[5], dealt with the powers of the High Court under Article 227 of the Constitution.

1. 1954 S.C.J. 290 : (1954) S.C.R. 565 : A.I.R. 1954 S.C. 215.
2. 1955 S.C.J. 267 : A.I.R. 1955 S.C. 233.
3. 1958 S.C.J. 798 : A.I.R. 1958 S.C.398.
4. (1971) 2 S.C.J. 17 : A.I.R. 1971 S.C. 315.
5. (1973) 1 S.C.R. 185 : A.I.R. 1972 S.C. 1598.

7. From all these decisions there cannot be any dispute that the High Court has got power of judicial superintendence over the decisions of the Tribunals which are subject to its jurisdiction under Article 227 of the Constitution. There can be no doubt that the power of the High Court to decide a question as to whether the Election Court has a right to set aside an *ex parte* order passed by it would fall within Article 227. The contention is therefore rejected.

8. (This petition coming for final hearing this day in pursuance of the above order of reference, the order of the Lower Court and the record in the case and upon hearing the arguments of Mr. M. Srinivasan, advocate, for petitioner and of Mr. R. Balasubramanian, advocate for respondent the Court made the following Order):—

(The Judgment of the Court was delivered by the Hon'ble the Chief Justice)

9. The civil revision petition in the first instance came before Kailasam, J. An election petition under the Panchayats Act and the election rules framed thereunder was filed contesting the election. That petition was dismissed for default of appearance. An application under Order 9, rule 9, Civil Procedure Code, was also dismissed, the Election Commissioner being of the view that the rule was not applicable to Election Court and he could not, therefore, restore the election petition. Two points were urged before Kailasam, J. One was that, in view of rule 6 of the Election Rules, the Election Court had power under Order 9, rule 9, Civil Procedure Code to set aside the order of dismissal for default; *Koti Reddi* v. *Venkayya*[1], decided by the then learned Chief Justice and Somasundaram, J., held that Order 9 did not enable the Election Court to restore the election petition. But, there, the disposal of the election petition was on merits. *Natarajan* v. *State of Madras*[2], which was decided by Ramaswami, J., and Ananthanarayanan, J., held, however, that, in order to render justice by Tribu-

1. (1951) 1 M.L.J. 347: 64 L.W. 301 : I.L.R. (1952) Mad. 104.
2. (1960) 2 M.L.J. 150: I.L.R. (1960) Mad. 449: 73 L.W. 113.

nals such as the Tribunal set up under the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948, so long as they exercise judicial functions, the Tribunals should be held to possess inherent power to review their judgments, where due cause was shown. That was a case of an Estate Abolition Tribunal giving a decision in the first instance on the question whether a certain village was an inam estate or not within the ambit of the definition in section 3 (2) (*d*) of the Madras Estates Land Act, 1908. The ryots were not parties to that case. Subsequently, the same Tribunal rendered a different decision after the ryots were brought on record. The question was whether the Tribunal had the power to review its own order. The Court opined that it had such power. This view was expressed not on the basis of any particular rule, but upon a consideration that a Tribunal exercising judicial functions should, in order to render justice, have inherent power to review its own judgment, where due cause was shown. Kailasam, J., found conflict of opinion in these two cases and regretted that *Koti Reddy* v. *Venkayya*[1], had not been brought to the notice of the Court in *Natarajan* v. *State of Madras*[2]. The learned Judge was also of opinion that after *Harish Chandra* v. *Trilokhi Singh*[3], no longer could *Koti Reddy* v. *Venkayya*[1] be the law. On that view he referred the question to a Full Bench, to wit, whether the Election Tribunal under the Panchayats Act had power to restore the election petition which was dismissed for default of appearance. The second point that was raised before the learned Judge was whether the application to set aside the order of the Election Tribunal declining to restore the election petition could be brought for attack under Article 227 of the Constitution. The learned Judge held that point in favour of the petitioner and it no longer arises before us.

10. We may at once state that, in our opinion, *Natarajan* v. *State of Madras*[2], was not right in its view that every Tribunal discharging judicial functions should, in order to enable it to do justice, have inherent power to review its own judgment where proper cause was shown. The Rules framed under Madras Act XXVI of 1948 did not confer any such power. But the learned Judges spelt out inherent power from the nature of the functions discharged by the Estates Abolition Tribunal. We must observe that, where, a statute creates a Tribunal and vests powers in it prescribing the procedure for the exercise thereof, it is confined to such powers and procedure as had been conferred upon it. This is because the Tribunal is but a creature of the statute which, having brought it into existence , has also limited its powers. If by necessary intendment of a particular provision made in that behalf the Court is of the view that such power is available, that is a different matter. But that was not what was held in *Natarajan* v. *State of Madras*[1]. The Court was prepared to say that every Tribunal should have inherent power to set aside its own order where proper cause was shown, provided the function discharged by it was judicial. We are unable to concur with this view. We may also point out that *Natarajan* v. *State of Madras*[1] was not a case of dismissal of a petition for default. It was concerned, as we said, with a decision which the Tribunal had rendered first and which it had sought to review on a subsequent occasion. *Koti Reddi* v. *Venkayya*[2], does not also appear to be apposite in deciding the instant case, because that was also a case of an election petition decided on merits. It is evident from the judgment therein that, though the party had not appeared, the election petition was proceeded with, evidence was taken and a conclusion was arrived at, on the basis of which the election petition was disposed of. The Court pointed out that having regard to rule 6 (i) and the enumeration of specific powers under the second limb of that Rule, the provisions of the Civil Procedure Code, more particularly Order 9, rule 9 relating to restoration of a suit dismissed for default where sufficient cause was shown would not be applicable. In other words, the

1. I.L.R. (1952) Mad. 104: (1951) 1 M.L.J. 347 : 64 L.W. 301.
2. (1960) 2 M.L.J. 150: I.L.R. (1960) Mad. 449 : 73 L.W. 113.
3. 1957 S.C.J. 297: A.I.R. 1957 S.C. 444.

1. (1960) 2 M.L.J. 150: I.L.R. (1960) Mad. 449 : 73 L.W. 113.
2. I.L.R. (1952) Mad. 104: (1951) 1 M.L.J. 1 M.L.J. 347: 64 L.W. 301.

learned Judges, view was that rule 6 (1) should be confined to the powers under the Civil Procedure Code which pertain to trial and disposal of a suit and that, once the election petition had been disposed of, thereafter the powers under the Civil Procedure Code would not be available to the Election Tribunal. But the Court had no occasion to consider whether the Election Tribunal had at all power to dismiss an election petition for default of appearance without going into merits after taking evidence. Our attention has been invited to a judgment in W.P. No. 595 of 1960 which was rendered by one of us and which was a case of dismissal for default of appearance in an election petition. An application to restore the petition was dismissed on the ground that the Election Commissioner had no power and this order was sustained. In doing so, the Court followed *Koti Reddi* v. *Venkayya*[1]. When *Mallappa Basappa* v. *Basavaraja Ayyappa*[2] was relied on, the Court examined the scheme of the Election Rules under the Panchayats Act and ruled that it was different from that of Representation of the People Act. In this case too, the Court had no occasion to consider whether at all the Election Court had the power to dismiss an election petition for default of appearance without going into the merits of the petition.

11. It is contended before us for the respondent that if as held in *Harish Chandra* v. *Triloki Singh*[3], the Election Court had power to amend the petition, it should follow that the Election Court had also the power to dismiss an election petition for default of appearance without going into merits. We are unable to accept this contention.

12. The question of power to dismiss for default without going into merits will have to be examined the light of the Rules read as a whole. The Rules for decision of election disputes relating to Panchayats say that no election held under the Panchayats Act can be called in question except by an election petition presented in accordance with those rules to an Election Court. A procedure is laid down as to how an election petition should be presented, including the period of limitation for filing and for service of summons. Rule 6, with which we are particularly concerned, is as follows :

> " (1) Every election petition shall be enquired into by the Election Court as nearly as may be in accordance with the procedure applicable under the Civil procedure Code 1908, to the trial of suits: Provided that it shall only be necessary for the election Court to make a memorandum of the substance of the evidence of any witness examined by it.
>
> (2) The Election Court shall have the powers which are vested in a Court under the Civil Procedure Code, 1908, when trying a suit, in respect of the following matters :—
>
> (*a*) discovery and inspection.
>
> (*b*) enforcing the attendance of witnesses, and requiring the deposit of their expenses :
>
> (*c*) Compelling the production of documents ;
>
> (*d*) examining witnesses on oath ;
>
> (*e*) reception of evidence taken on affidavit ; and
>
> (*f*) issuing commissions for examination of witnesses, and may summon and examine *suo motu* any person whose evidence appears to it to be material."

Sub-rule (1) read by itself is, no doubt, wide enough to cover the entirety of Order 9, rule 9, Civil Procedure Code. Whether the width of the power so conferred has been restricted by the enumeration of specific items under sub-rule 2 does not arise for our consideration. But assuming that the power under Rule 6 sub-rule (1) covers also Order 9, rule 9 in its entirety, the question will be whether this is not restricted by the scheme of the rest of the Rules. Rule 7 interdicts an election petition being withdrawn without leave of the Election Court. A procedure is indicated for grant of leave for withdrawal. In case leave is granted, the petitioner will be ordered to pay costs of the respondent as the Election Court thinks fit. Rule 9 says that an election petition shall abate

1. I.L.R. (1952) Mad. 104 : (1951) 1 M.L.J 347: 64 L.W. 301.
2. 1958 S.C.J. 953: 1959 S.C.R. 611: A.I.R. 1958 S.C. 698.
3. 1957 S.C.J. 297: 1957 S.C.R. 370 ; A.I.R. 1958 S.C. 444.

on the death of a sole petitioner or of the survivor of several petitioners. In other words, where there is only a sole petitioner in an election petition, his death will bring about an end to the election petition. We may pause for a moment and observe that this is not the result under the Representation of the People Act, as pointed out by the Supreme Court in *Mallappa Basappa* v. *Basavaraj Ayyappa*[1]. Rule 11 specifies the grounds on which an election can be set aside. Rule 12 follows it up and contemplates that, at the conclusion of the enquiry, the Election Court shall declare whether the election of the returned candidate or candidates is void under Rule 11. Sub-rule (3) of this Rule makes the order of the Election Court under Sub-Rule (1) final. Equally, it makes as order of an Election Tribunal final under Sub-Rule (2) which relates to declaration of the election of the returned candidate, declaration of any other party to the petition as having been duly elected or ordering a fresh election. Rule 13 shows that the moment an election is held to be void, the seat shall be deemed to be vacant from the date of the order of the Election Court and the authority concerned shall forthwith take the necessary steps for holding fresh elections. These Rules, to our minds, suggest a scheme under which, once an election petition is filed, it has to be proceeded with to its conclusion on merits barring the two instances, namely, withdrawal of the petition with the leave of the Court or termination of the petition on the death of the petitioner who happens to be the sole one. It is also significant that, once an order is made on merits it shall be final. It is in the light of this scheme and Rules that we have to see the scope of Rule 6 (1) as to the extent to which Order 9, Rule 9, Civil Procedure Code, will be available to the instant case. Sub-Rule (1) of Rule 6 visualises that it is only as nearly as may be that the Civil Procedure Code, applicable to trial of suits may be extended. This implies that, if the rules as we have considered contemplate a situation where an election petition has to end only on merits barring the two exceptional cases we have pointed out then there is no room for applying Order 6. Rule 9, Civil Procedure Code, in so far as it confers powers on a civil Court to set aside an order of dismissal for default of appearance. It is hardly necessary to point out that an Election Tribunal or Commissioner under the Election Rules of the Panchayats Act is but a *persona designata* and not a civil Court possessing all the powers under the Code of Civil Procedure. It is remarkable that even the High Court, while exercising powers under section 115, Civil Procedure Code, cannot dismiss a petition thereunder for default of appearance, and, in any case once that was done, it would have no power to restore it.

13. As may be seen from our observations *supra* it is not necessary, on the view we have taken, to decide whether if the Election Tribunal had the power to dismiss the election petition for default of appearance without going into merits, it would have the power to set aside such an order. We have taken the view that the Election Rules relaing to decision of election disputes under the Panchayats act do not confer power upon an Election Tribunal to dismiss an election petition for default of appearance. The election petition could and should end only by an order under Rule 12 except in the two cases, namely: (1) where leave is granted for withdrawal; and (2) where there is the death of the sole petitioner in the election petition. Accordingly the petition will stand allowed. No costs. We make it clear that by this order we mean that, the order of dismissal for default without going into merits being without jurisdiction and, therefore, a nullity, the election petition has not been disposed of at all.

S.J. —— *Petition allowed.*

1. 1958 S.C.J. 953 : 1959 S.C.R. 611; A.I.R. 1958 S.C. 698.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*P. R. Gokulakrihnan, J.*

Arumugham Chettiar and others .. *Appellants**

v.

A. Vallinayagam Pillai .. *Respondent.*

(A) *Will—Construction—Bequest to S to enjoy for life—Thereafter to her sons—Intention of the testator—Ascertainment—Nature of estate taken by S.*

(B) *Civil Procedure Code (V of* 1908), *section* 60 (m)—*Contingent or possible right or interest—Attachment —Whether effective.*

The intention of the settlor has to be ascertained by reading the document as a whole and if there is any ambiguity, one can look at the circumstances under which the document came to be executed and also, if necessary, to the subsequent conduct of the parties which might throw some light on the intention of the settlor. [*Para.* 8.]

The absence of words conferring powers of alienation in the document does not make any difference where there are words of sufficient amplitude to confer an absolute estate on the settlee. [*Para.* 8.]

Expectancy of succession by survivorship or merely contingent or possible right or interest cannot be attached. [*Para.* 11.]

Held on facts, that *S* was given a right to enjoy for life only the income from the properties without in any way encumbering the same. [*Para.* 6.]

Cases referred to :—

Govindaraja Pillai v. *Mangalam Pillai*, (1932) 63 M.L.J. 911 : 139 I.C. 867 : 36 L.W. 733 : A.I.R. 1933 Mad. 80 ; *Sri Subramaniaswami Temple* v. *Ramaswamia Pillai*, (1950) 1 M.L.J. 300 : 63 L.W. 193 : A.I.R. 1950 P.C. 32 ; *Poomalai Ammal* v. *Subbammal*, (1952) 2 M.L.J. 884: A.I.R. 1953 Mad. 566 ; *Jiban Krishna Das* v. *Jitendra Nath Das*, (1949) 1 M.L.J. 628 : 62 L.W. 417 : A.I.R. 1949 F.C. 417 ; *Pestonjee Bhicajee* v. *Anderson*, (1938) 2 M.L.J. 906 : A.I.R. 1939 P.C. 6.

Appeal against the decree of the Court of the Subordinate Judge, Tirunelveli in Appeal Suit No. 86 of 1969 preferred against the decree of the Court of the District Munsif of Tenkasi in Original Suit No. 160 of 1968.

T. R. Mani, for Appellants.

T. R. Srinivasa Iyer, for Respondent.

The Court delivered the following

JUDGMENT.—Defendants 1 to 3 are the appellants. The suit was for partition and separate possession of the plaintiff's one third share in the plaint schedule properties and for mesne profits.

2. The case of the plaintiff was that one Thiruvengadathammal got the suit properties under a will dated 25th January, 1925, that Thiruvengadathammal executed a will on 13th June, 1931 giving a life-estate in the plaint schedule properties to her daughter-in-law Sivagnanathamal, wife of Manickavasagam Chettiar and the vested remainder to her three sons. *viz*., Surianarayanan Chettiar, Arumugham Chettiar and Kasiviswanathan. Arumugham Chettiar is the first defendant and Kasiviswanathan is the second defendant. Minor Chelli Manickathammal, daughter of the second defendant, has been impleaded as the third defendant. According to the will of Thiruvengadathammal, marked as Exhibit A-2 in the case, Sivagnanathammal had to enjoy the properties without any power of alienation till her lifetime and after her lifetime, her three sons should take the properties absolutely. The plaintiff obtained a decree against Surianarayanan Chettiar for Rs. 1,580.97 with future interest and costs in O. S. No. 157 of 1940, on the file of the Court of the District Munsif, Ambasamudram. The plaintiff filed E. P. No. 297 of 1949 and attached the undivided one-third share of the vested remainder belonging to the judgment-debtor Surianarayanan Chettiar and brought it for sale. The plaintiff himself became the auction-purchaser

*S.A. No. 52 of 1972.

20th December, 1974.

in the Court-auction held on 10th March, 1950 and the same was duly confirmed, and a sale certificate was issued to the plaintiff on 15th April, 1950. The plaintiff obtained symbolic delivery through Court under Order 21, Rule 96, Civil Procedure Code on 4th May, 1950. Ever since, the plaintiff has been in possession of the undivided one-third of the vested remainder of Surianarayanan Chettiar. Surianarayanan Chettiar died on 29th October, 1946. The life-estate holder Sivagnanathammal died on 6th March, 1966, and on her death the plaintiff is entitled to possession of one-third share in the properties. Since the first and second defendants, have taken possession of the whole of the plaint schedule properties, the plaintiff came forward with the suit.

3. Defendants 1 and 2 contended that Surianarayanan Chettiar and defendants 1 and 2 were not given vested remainder. Surianarayanan Chettiar pre-deceased Sivagnanathammal and so he was not entitled to one-third share. The contingent right was not liable to be attached, and the delivery proceedings were not valid and binding on the defendants. In O. S. No. 357 of 1940, Surianarayanan Chettiar's heirs were not impleaded. The defendants were not aware of the suit O.S. No. 357 of 1940 and delivery proceedings. Subsequent to the death of Sivagnanathammal, the defendants have become entitled to the suit properties and they have been in enjoyment thereof. The income from the suit lands will be 38 kottahs of paddy, and not 50 kottahs as claimed by the plaintiffs. The lands were leased out to Pandara Kudumban during the life-time of Sivagnanathammal, and the said Pandara Kudumban was cultivating the lands. The second defendant settled his properties on his daughter, the third defendant. The third defendant adopted the written statement of defendants 1 and 2. On the pleadings and on the evidence on record, the trial Court held that life interest was given to Sivagnanathammal under Exhibit A-2, that Surianarayanan Chettiar and defendants 1 and 2 were given the vested remainder under the will Exhibit A-2 and that therefore the plaintiff is entitled to partition and separate possession of a one-third share in the properties. Aggrieved by the decision of the trial Court, the defendants preferred an appeal to the Sub-Court, Tirunelveli. The lower appellate Court held that Surianarayanan Chettiar got vested remainder under Exhibit A-2 and not a contingent interest in the suit properties, and that Sivagnanathammal never took absolute estate under the will Exhibit A-2.

4. Aggrieved by the decision of the Courts below, the defendants have preferred this second appeal. Thiru T.R. Mani, the learned counsel appearing for the appellants, submitted that an absolute right was granted to Sivagnanathammal and as such the subsequent bequest to Sivagnanathammal's sons is void under the rule of repugnancy. The learned counsel also contended that a gift over has been given to the children of Sivagnanathammal and therefore until succession opened the share of Surinarayanan Chettiar cannot be determined and that since Surinayanan Chettiar predeceased Sivagnanathammal the plaintiff cannot have any right in the suit properties.

5. In support of his contention, Thiru T.R. Mani relied upon a passage in "Mulla on Transfer of Property Act', sixth edition page 156, where in paragraph 4 it is stated :

> "A conditional limitation is a condition of defeasance, which terminates the interest of one person and invests another person with it. But if an estate is given to a named donee in terms which confer an absolute estate, and then a further interest is given merely after or on termination of that donee's interest and not in defeasance of it, the further interest will be be void for repugnancy,"

and submitted that as per Exhibit A-2 Sivagnanathammal was given absolute right and any subsequent terms or condition in Exhibit A-2 can be ignored by Sivagnanathammal. In this connection he also sought to his aid section II of the Transfer of Property Act, which runs as follows :

> " Where, on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a

particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction, "

and also section 138 of the Indian Succession Act, which runs as follows :

" Where a fund is bequeathed absolutely to or for the benefit of any person, but the will contains a direction that it shall be applied or enjoyed in a particular manner, the legatee shall be entitled to receive the fund as if the will had contained no such direction."

On the strength of the above, T.R. Mani wanted this Court to infer that absolute right has been conferred upon Sivagnanathammal in respect of the suit properties. According to him, as per the recitals in paragraph 6 of Exhibit A-2 the plaint properties were absolutely given to Sivagnanathammal and any subsequent directions in the will as if the sons of Sivagananathammal can enjoy the property, can be ignored as repugment under the doctrine of repugnancy.

6. The learned counsel also cited, in support of his submission, the decision in *Govindaraja Pillai* v. *Mangalam Pillai*[1] wherein it is observed :

" The more difficult question is whether the subsequent clause should be deemed to be a mere repugnant condition imposed on the estate so created or makes the absolute estate primarily granted subject to defeasance in the event of the contemplated contingency. The distinction between a repugnant provision and a defeasance provision is sometimes subtle, but the general principle of law seems to be that where the intention of the donor is to maintain the absolute estate conferred on the donee but he simply adds some restrictions in derogation of the incidents of such absolute ownership, such restrictive clause would be repugnant to the absolute grant and therefore void......"

I have been taken through Exhibit A-2 the will dated 12th June, 1931 created by Thiruvengadathammal. It is clear from paragraph 6 of the will that the suit properties have been absolutely given to the sons of Sivagnanathammal with a right to Sivagnanathammal to enjoy for life only the income from the properties without in any way encumbering the same. Thus, it is clear that the argument advanced by T.R. Mani as though absolute right has been given to Sivagnanathammal and that the subsequent direction in the will is repugnant, cannot at all be sustained.

7. T.R. Mani relies upon section 28 of the Transfer of Property Act, which is analogous to section 131 of the Indian Succession Act and also cited *Sri Subramaniaswami Temple* v. *RamaswamaiPillai*[1], and contended that the will Exhibit A-2 conferred absolute right in respect of the suit properties in favour of Sivagnanathammal. In view of my finding that Exhibit A-2 never created an absolute right in favour of Sivagnanathammal in respect of the suit properties, I do not think it is necessary to consider the above provisions of law and the case-law.

8. In *Poomalai Ammal* v. *Subbammal*[2], cited by Thiru T.R. Mani, the learned counsel for the appellants, it has been observed:

" The intention of the settlor has to be ascertained by a reading of the document as a whole and if there is any ambiguity one can look to the circumstances under which the document came to be executed and also, if necessary , to the subsequent conduct of the parties which might throw some light on the intention of the settlor. "

In the same very decision, it has also been held :

" The absence of words conferring powers of alienation in the document does not make any difference as there are words of sufficient amplitude to confer an absolute estate on the settlee. "

Thus, in the light of my above conclusion as regards the effect of the recitals in Exhibit A-2, the decision in *Poomalai Ammal* v. *Subbammal*[2], supports the case of the plaintiff, rather than of the defendants.

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1. (1932) 63 M.L.J. 911 : 139 I.C. 867 : 36 L.W. 733 : A.I.R. 1933 Mad. 80.

1. (1950) 1 M.L.J. 300: 63 L.W. 193: A.I.R. 1950 P.C. 32.
2. (1952) 2 M.L.J. 884 : A.I.R. 1953 Mad. 566.

9. According to T.R. Mani, as per the recitals in Exhibit A-2 the gift is to a class of persons, that is, to the sons of Sivagnanathammal and also to the grandsons of Sivagnanathammal through her sons; and he wanted the Court to infer the above from a reading of paragraphs 2 and 6 of Exhibit A-2 with special reference to the words "மேலே கண்ட என் பௌத்ரர்களுக்கு" in paragraph 6.

10. The decision cited by the learned counsel reported in *Jiban Krishna Das* v. *Jitendra Nath Das*[1], which is a decision of the Federal Court of India, clearly states:—

> " Now all the authorities agree, that in construing a will the cardinal maxim to be observed is that the Court should, in all cases, endeavour to ascertain the real intention of the testator. The intention means the intention which the will itself by express words or by implication declares, and the primary duty of the Court is to ascertain from the language of the entire document what the intentions of the testator are."

It is clear from the will Exhibit A-2 that the intention of the testator is not to create absolute right in respect of the suit properties in favour of Sivagnanathammal, but to create a vested right in favour of Surianarayanan Chettiar, Arumugham Chettiar and Kasiviswanathan.

11. Thiru T. R. Mani, on the basis of section 60 (*m*), Civil Procedure Code, contended that the attachment made by the plaintiff was ineffective since no attachment could be made on the expectancy of succession by survivorship or other merely contingent or possible right or interest. In this connection he relied on *Pestonjee Bhicajee* v. *Anderson*[2]. As I have already observed, there is no question of expectancy of succession by survivorship or other merely contingent or possible right or interest in relation to Surianarayanan Chettiar, Arumugham Chettiar and Kasiviswanathan. On the other hand, a vested right was created absolutely on Surianarayana Chettiar, Arumugham Chettiar and Kasiviswanathan under Exhibit A-2, itself.

11-A. Thiru T. R. Srinivasa Ayyar, learned counsel appearing for the respondent, rightly contended that from a reading of Exhibit A-2 the intention of the testator is clear and there is absolutely no ambiguity in absolute right having been created in favour of Surianarayanan Chettiar, Arumugham Chettiar and Kasiviswanathan and a life-interest in favour of Sivagnanathammal. The terms of paragraph 6 of the will Exhibit A-2 are absolutely unambiguous, and there is no basis in the contention put forth by the learned counsel for the appellants. Thiru T. R. Srinivasa Ayyar would distinguish the words "பாத்தியப் படுத்தியிருக்கிறேன்" "occurring in paragraph 6 of Exhibit A-2 and the words "பாத்தியப்படுத்தி கொடுத்து விட்டேன்" occurring in paragraph 8 of Exhibit A-2, and submitted that the above words in paragraph 6 do not convey the meaning of conferring any right absolutely, while those used in paragraph 8, above extracted, convey the meaning of conferring absolute right. I am in complete agreement with the interpretation given by Thiru T. R. Srinivasa Ayyar.

12. Thiru T. R. Srinivasa Ayyar also brought to my notice that nobody has got the sale set aside or questioned the sale from the year 1949 and as such it is too late for the appellants to agitate the matter which has become final already. Although this cannot be a legal argument, the long silence for over a decade only reveals the lack of *bona fides* on the part of the appellants.

13. On the above discussion, I find that no ground is made out for interference in this second appeal, with the concurrent findings of the Courts below.

14. In these circumstances, the second appeal is dismissed. No costs. No leave.

R.S. ——— *Appeal dismissed.*

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1. (1949) 1 M.L.J. 628 : 62 L.W. 417 : A.I.R. 1949 F.C. 64.
2. (1938) 2 M.L.J. 906 : A.I.R. 1939 P.C. 6.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT :—*K. Veeraswami, CJ. and Natarajan, J.*

State of Tamil Nadu, represented by the Joint Secretary to the Government, Revenue Department, Madras 9 and another .. *Appellants**

v.

His Holiness Sri-la-Sri Ambalavana Pandara Sannadhi Avergal, Adheenakarthar, Thirivaduthurai Adheenam, Thanjavur District .. *Respondent.*

Madras Inams (Supplementary) Act (XXXI of 1963), *section* 5 *and Madras Act (XXX of* 1963)*—Lands notified in* 1965 *under the Act—Determination whether it is minor inam or not —Powers of the Tribunal.*

Constitution of India (1950), *Article* 226.

Where the jurisdiction of a Tribunal or Court is dependent on certain characteristics, it would be incidental to the jurisdiction of the Tribunal or Court to find out as a preliminary issue whether the elements are present in order to assume or not to assume jurisdiction to proceed further. Where one party says that the land is non-ryotwari and it constitutes a minor inam and the other party claims that the land is ryotwari, the Tribunal, under section of 5 Act XXXI of 1963 would certainly have jurisdiction to decide that issue and once the Tribunal decides that the land is non-ryotwari the further question would arise whether it would be a minor inam. The two questions are well within the power of the Tribunal to decide under section 5. [*Para.* 2.]

Article 226 of the Constitution is not subject to any limitation as to the jurisdiction of the High Court. However wide the power thereunder is, it is plain in exercising that power the High Court would not allow the parties to by-pass or circumvent or defeat any of the statutory provisions providing for other remedies in specific cases. [*Para.* 2.]

*W.A. No. 150 of 1973. *9th January,* 1975.

Appeal under Clause 15 of the Letters Patent against the Order of the Honourable Justice Palaniswamy dated 25th March, 1971 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 3795 of 1969 presented under Article 226 of the Constitution of India to issue a writ of *certiorari,* calling for the records connected with the proceedings of the 2nd respondent Additional Assistant Settlement Officer of Nagercoil dated 9th November, 1969 published in the Tirunelveli District Gazette and quash the same in so far as it relates to Mekkarai village, Shencottai Taluk, Tirunelveli District.

The Government Pleader, for Appellants.

S. Gopalan, for Respondent.

The Judgment of the Court was delivered by

Veeraswami, C.J.—This is an appeal by the State from a judgment of Palaniswamy, J., which is capable of disposal on a short ground, though the learned Judge had gone into the merits of the question whether the lands notified under Madras Act XXX of 1963 constituted minor inams or not. He answered that question in the negative. The State's objection based on the Madras Inams (Supplementary) Act, 1963, did not find favour with him which, in our opinion and with due respect to the learned Judge, was not right.

2. The Madras Inams (Supplementary) Act, 1963, was enacted, as seen from the preamble to the Act, to provide for the determination of the question whether any non-ryotwari area in the State of Madras is or is not an existing inam estate, a part village inam estate, a minor inam or a whole inam village in Pudukkottai. Madras Act XXX of 1963 which deals with the abolition of minor inams, did not provide for a machinery to decide whether an inam is a minor inam to which that Act would have application. Madras Act XXXI of 1963 which is the Madras Inams (Supplementary) Act, 1963, provides for the machinery. Section 5 starts with a *non obstante* clause and confers jurisdiction upon the Settlement Officer to decide whether " the non-ryotwari " area specified in the application is or is not "among other things a minor inam. The defi-

nition section 2 read with the *non-obstante* clause in section 5, shows that section 5 is overriding and under the former section an existing inam estate shall have the same meaning as in clause (4) of section 2 of the Inam Estates Abolition Act and minor inam, as in clause 2 of the Minor Inams Abolition Act. The whole object of section 5 is to enable to decide when a dispute arises as to the character of the land. If it is non-ryotwari, the question would be whether it would constitute one or the other forms of estates listed in section 5. If it is ryotwari, it would at once be clear that it would not constitute any one of those estates in the list. Palaniswamy, J., proceeded upon the view that section 5 would confine only to non-ryotwari area and, only if on application, section 5 involves such land, a question as to whether it constituted the other form of estate mentioned therein would arise. We are unable to accept this construction. It is a well accepted principle that, where the jurisdiction of a Tribunal or Court is dependent on certain characteristics, it would be incidental to the jurisdiction of the Tribunal to find out as a preliminary issue whether the elements are present in order to assume or not to assume jurisdiction to proceed further ; where one party says that the land is non-ryotwari and it constitutes a minor inam and the other party claims, as in this case, that the land is ryotwari, the Tribunal under section 5 would certainly have jurisdiction to decide that issue and, once the Tribunal decides that the land is non-ryotwari, the further question would arise whether, it would be a minor inam. These two questions are well within the power of the Tribunal under section 5 to decide. We cannot subscribe to the view that the jurisdiction is confined only where the land is admittedly non-ryotwari. To take that view, would defeat the very purpose of the Act. We find that the decision of the Tribunal is subject to an appeal and a further revision to this Court. The decision arrived at by the application of the Act is made binding upon the parties; *vide* section 8. Also, the jurisdiction of civil and Revenue Courts is barred by section 10 to adjudicate upon the questions adumbrated therein. Having regard to the scheme of the Act, we are of opinion that the question whether the notification made in 1965 under Madras Act XXX of 1963 on the footing that the lands were minor inams would have to be decided only under the provisions of Madras Act XXXI of 1963. It is true that Article 226 is not subject to any limitation as to the jurisdiction of this Court. However wide the power thereunder is, it is plain that in exercising that power this Court would not allow the parties to by pass or circumvent or defeat any of the statutory provisions providing for other remedies in specific cases. On that view of the matter, we allow the appeal with costs. Counsel's fee Rs. 150.

3. But in the circumstances of the case in order to serve the ends of justice, we direct that if the respondent files an application under section 5 within 60 days from this date, no question of limitation will be permitted to be raised, the application will be taken on file and the Tribunal will deal with on that basis. In disposing of such application, the Tribunal will not in any way be guided by the observations or conclusion of the learned Judge expressed in the petition fromwhich this appeal arose which we allowed.

R.S. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*C. J. R. Paul, J.*

G. Ambiga Ammal .. *Petitioner**

v.

Selvaraja Mudaliar .. *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), section 25—Petition for eviction—Petitioner Hindu Religious Trust—Revision pending before High Court—Notification by Government—Buildings owned by Religious Trusts and Charitable Institutions—Exemption from all provisions of the Act—Effect of notification.

In view of the fact that the Government acting under statutory power has by its

*C.R.P. No. 2677 of 1973. 12th February, 1975.

notification removed all buildings belonging to religious trusts from the purview of the Tamil Nadu Buildings (Lease and Rent Control) Act, the Court's jurisdiction to pass any orders in regard to the premises in question under the provisions of the Act including section 25, has come to an end. [*Para.* 3.]

The effect of the notification passed by the Government of Tamil Nadu in the instant case is that in respect of the premises in question, the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act would no longer apply and no order can be passed in respect of such a building under any of the provisions of the Act including section 25 which provides for a revision to the High Court. [*Para.* 4.]

Cases referred to :—

Seshadri Aiyangar v. *Narayana Nair*, (1949) 2 M.L.J. 396: 62 L.W. 627: A.I.R. 1950 Mad. 106; *Mulla* v. *Godhu*, (1970) 2 S.C.R. 129: (1970) 2 S.C.J. 258: A.I.R. 1971 S.C. 89.

Petition under sections 25 of the Madras Act XVIII of 1960 and 115 of Act V of 1908 praying the High Court to revise the Decree of the Court of Small Causes (Third Judge) Madras dated 3rd March, 1973 and passed in H. R. A. No. 587 of 1972. (H.R.C. No. 2739 of 1970) on the file of the Court of Small Causes (Eighth Judge) Madras.

M. S. Venkatarama Iyer and *N. C. Rangaswamy*, for Petitioner.

S. Arasappa, for Respondent.

The Court made following

ORDER.—This revision petition under section 25 of the Madras Buildings (Lease and Rent Control) Act, 1960 is filed by one Ambiga Ammal who is the trustee of Sri Pandurangaswami Bhajanai Koil and who filed an application before the learned Rent Controller under sections 10 (2) (*i*), 10 (2) (*ii*), (*b*), 10 (2) (*iii*) and 10 (2) (*v*) of the Madras Buildings (Lease and Rent Control) Act for eviction of the respondent who is a tenant in respect of a shop adjacent to the Sri Pandurangaswami Bhajanai Koil, which premises belongs to the aforesaid Sri Pandurangaswami Bhajanai Koil. The revision petitioner sought the eviction of the tenant on the following grounds: (1) that the tenant committed wilful default in the payment of rent; (2) that the tenant committed acts of waste in the premises; (3) that he caused nuisance to the occupiers of the other premises; and (4) that the tenant had converted the non-residential portion into a residential one. The tenant refuted those assertions and contended that the eviction petition is not maintainable, since there was no valid notice terminating the tenancy. The learned Rent Controller found that there was no wilful default in the payment of rent and that the tenant did not commit any act of waste or cause any nuisance to the occupiers of the other premises. But, he found that the tenant was using the premises for a purpose other than the one for which it was leased out, inasmuch as the premises was let out for non-residential purposes, but the tenant was using it as a residential one. The learned Rent Controller, despite his finding that the tenant had used the premises for a purpose other than the one for which it was leased out, yet dismissed the petition on the ground that no valid notice terminating the tenancy was given. On appeal by the revision petitioner, the Appellate Authority agreed with the findings of the learned Rent Controller. Hence this revision petition.

2. The only point that has been raised in this revision petition is that both the Courts below erred in holding that there was no valid notice terminating the tenancy. On behalf of the revision petitioner Mr. Venkatarama Iyer endeavoured to show that there was a valid notice terminating the tenancy inasmuch as the notice, the copy of which is Exhibit P-7, was sent under certificate of posting properly addressed to the tenant and a registered notice was also sent in addition to the sending of a copy of the notice under certificate of posting Mr. Arasappa on behalf of the respondent, after refuting the arguments addressed by Mr. Venkatarama Iyer, raised a new point. He has contended that in view of G.O.Ms. No. 1998, Home, dated 12th August, 1974 passed by the Government of Tamil Nadu in exercise of the powers conferred

on it by section 29 of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960, this revision petition is not maintainable at all, and this Court has no jurisdiction to pass any orders in regard to the premises in question in view of the aforesaid Government Order. Section 29 of the Tamil Nadu Buildings (Lease and Rent Control) Act empowers the Government to exempt any building or class of buildings from all or any of the provisions of the Act by means of a notification and it is in pursuance of that power, that the notification dated 12th August, 1974 in G.O.Ms. No. 1998 has been issued, whereby the Government has exempted all the buildings owned by Hindu, Christian and Muslim religious trusts and charitable institutions from all the provisions of the Act. Admittedly, the premises in question belongs to a Hindu religious trust. Therefore after 12th August, 1974, the date on which this notification was issued, no provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act would apply to buildings owned by Hindu, Christian and Muslim religious trusts and charitable institutions. Mr. Arasappa therefore contends that this Court cannot now pass any order with regard to this premises under any of the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act, in this revision proceedings which is under section 25 of the Madras Act XX of 1960, since the building in question is now removed from the purview of all the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act including section 25. On behalf of Mr. Venkatarama Iyer, the learned counsel for the revision petitioner Mr. N. C. Rangaswamy, argued that on the date when this revision petition was filed, the revision petitioner had the right under section 25 of the Tamil Nadu Buildings (Lease and Rent Control) Act to file a revision before this Court, and that right has not been taken away by the issuance of the notification referred to above, which notification is not to take effect retrospectively and that consequently this Court has jurisdiction to pass an order in this revision proceeding with regard to the premises in question despite the notification. In support for this contention, he has cited the decision of Balakrishna Aiyar, J., in *Seshadri Aiyangar* v. *Narayana Nair*[1]. That was a case where the tenant was unsuccessful before the Rent Controller and the Collector, who, under the Madras House Rent Control Order of 1945, was the appellate authority, and the tenant presented a petition to the Government under the provisions of that Order to revise the order of the Collector. After the filing of that petition before the Government, the Madras House Rent Control Order of 1945 ceased to be in force, and Madras Act XV of 1946 had taken its place. It was after the Madras House Rent Control Order, had ceased to be in force and Madras Act XV of 1946 had taken its place that the Government passed orders allowing the petition of the tenant. It was contended before Balakrishna Aiyar, J., that since the source from which the Government derived their power had dried up, their order revising the order of the Collector after Madras Act XV of 1946 had taken the place of the Madras House Rent Control Order was incompetent. Balakrishna Aiyar, J. repelled that contention. He has observed that,

> "When what is called a permanent Act, that is to say, an Act which is of indefinite duration is repealed, section 8 of the General Clauses Act, 1891 (Madras) provides that unless a different intention appears the repeal shall not affect any right, privilege, obligation or liability, acquired, accrued or incurred under any enactment so repealed or affect any investigation, legal proceedings or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid and any such investigation, legal proceeding or remedy may be instituted or continued or enforced and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or regulation had not been passed. The provision of this section will not directly apply when a temporary Act expires by efflux of time. What is to happen to pending proceedings in such a case must depend upon the intention of the Legislature, and where clear words are not used

1. (1949) 2 M.L.J. 396 : 62 L.W. 627 : A.I.R. 1950 Mad. 106.

the intention must be inferred from the relevant circumstances. Thus, where a temporary Act sets up a special Tribunal and as the result of the expiration of Act, the Special Tribunal ceases to exist and no clear provision is made for continuing pending proceedings it will be reasonable to infer that the intention of the Legislature is that such proceeding shall not be continued."

Balakrishna Aiyar, J., eventually held that,

> "Regard being had to the facts that the right which the tenant had was a vested right, that the authority before whom proceedings could be taken to enforce that right continued to exist and section 18 of Madras Act XV of 1946 suggests that the intention of the Legislature was that all pending proceedings should as far as possible be saved, it must be found that the decision of the Court below was right".

3. But, those observations will not apply to the case now before me, because this is not a case where a temporary Act had ceased to exist and had been repealed by a permanent Act. This is a case where under the statute itself, power was given to the Government to exempt any premises from the operation of all or any of the provisions of the Act. In pursuance of that power, the Government had exempted all buildings belonging to the religious trusts and charitable institutions from all the provisions of the Act. No doubt, at the time when this revision petition was filed, the petitioner had the right to file a revision petition under section 25 of the Act before this Court. But in view of the fact that the Government by its notification has removed all buildings belonging to religious trusts from the purview of the Act, in my view this Court's jurisdiction to pass any orders in regard to the premises in question in this case which by reason of the aforesaid notification has been exempt from all the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act including section 25, has come to an end. Mr. Arasappa has referred to the decision of the Supreme Court in *Mulla* v. *Godhu*[1]. That was an appeal preferred by one set of pre-emptors against the order of the High Court allowing the rival pre-emptor's appeal by reducing the pre-emption money under the Punjab Pre-emption Act (X of 1960). It deprived them of their right of pre-emption with retrospective effect. That contention was upheld by the Supreme Court.

4. The effect of the notification passed by the Government of Tamil Nadu mentioned above is that in respect of the premises in question, the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act would no longer apply and no order can be passed in respect of such a building under any of the provisions of the Act including section 25 which provides for a revision to this Court. Therefore, I find that this Court has no jurisdiction now to pass any orders with regard to the premises in question and consequently, this revision petition has to be dismissed and it is dismissed. No costs.

R.S. ——— *Petition dismissed.*

[FULL BENCH]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*K. Veeraswami, C.J., S. Natarajan and S. Mohan, JJ.*

Century Flour Mills Ltd. .. *Petitioner**

v.

S. Suppiah and another .. *Respondents.*

and

P. Govindaswamy .. *Petitioner*

v.

S. Suppiah and another .. *Respondents.*

Civil Procedure Code (V of 1908), section 151—Scope—Company—Convening of General Body Meeting stayed by order of Court—Meeting held in contravention of order and resolutions passed—Application to set aside resolutions—Whether maintainable.

The inherent powers of the High Court under section 151 of the Code of Civil

1. (1970) 2 S.C.R. 129 : (1970) 2 S.C.J. 258: A.I.R. 1971 S.C. 89.

* C.M.P. Nos. 10347, 10935, 13855 and 13856 of 1974 in O.S.A. No. 64 of 1974. 11*th March*, 197

Procedure, are wide and are not subject to any limitation. Where in violation of a stay order or injunction against a party, something has been done in disobedience, it will be the duty of the Court as a policy to set the wrong right and not allow the perpetuation of the wrong-doing. The inherent power will not only be available in such a case, but it is bound to be exercised in that manner in the interests of justice. [*Para.* 8.]

Cases referred to :

Mulraj v. *Murti Raghunathji*, (1968) 1 S.C.J. 392: (1967) 3 S.C.R. 84: A.I.R. 1967 S.C. 1386; *Manchar Lal* v. *Seth Hiralal*, A.I.R. 1962 S.C. 527; *N. Senapathi* v. *Sri Ambal Mills*, (1965) M.L.J. (Crl.) 696 : I.L.R. (1966) 1 Mad. 143: A.I.R. 1966 Mad. 53; *Subodh Gopal* v. *State of Bihar*, A.I.R. 1969 Pat. 72; *Hari Nandan* v. *S. N. Pandits*, A.I.R. 1975 All. 48; *State of Bihar* v. *Usha Devi*, A.I.R. 1956 Pat. 455; *Magna* v. *Rustam*, A.I.R. 1963 Raj. 3; *Pushakkal* v. *Mahadeva Pattar*, 35 M.L.J. 96: 47 I.C. 778; *Balbhaddar* v. *Balla*, A.I.R. 1930 All. 387 (2); *Lord Krishna Sugar Mills Ltd.* v. *Abanash Kaur*, (1974) Comp. Cas. 210.

Petitions praying that in the circumstances stated therein and in the affidavits filed therewith the High Court will be pleased to: (1) dismiss O.S. A. No. 64 of 1974 as having became infructuous (in C.M.P. No. 10347 of 1974); (2) declare the meeting purported to have been held by the Respondent on 14th September, 1974 in violation of the stay order and resolutions passed thereon as void, illegal and inoperative (in C.M.P. No. 10935 of 1974);(3) dismiss O.S.A. No. 64 of 1974 as not maintainable in law (in C.M.P. No. 13855 of 1974); and(4) dismiss the C.M.P. No. 10935 of 1974 as not maintainable in law (in C.M.P. No. 13856 of 1974) in O.S.A. No. 64 of 1974 preferred to the High Court under Clause 15 of the Letters Patent, against the order of the Honourable Mr. Justice Sethuraman, dated 11th September, 1974, and made in the exercise of the Original Jurisdiction of the High Court in Company Petition No. 85 of 1974.

N. Panchapakesa Iyer, Advocate, for Petitioner in C. M. P. No. 10347 of 1974 and for Respondent in C.M.P. No. 10935 of 1974, for *Anand Dasgupta* and *Sagar*, Advocates, for Petitioners in C.M.P. No. 13855 and 13856 of 1974.

The Advocate-General, *T. Raghavan* and *T. K. Seshadri*, Advocates, for Respondents in C.M.P. No. 10347 of 1974, 13855 and 13856 of 1974 and for Petitioners in C.M.P. No. 10935 of 1974.

The Order of the Court was made by

Veeraswami, C J.—An extraordinary general body meeting of the shareholders of the Century Flour Mills Limited, Madras, was fixed for 14th September, 1974. The appellants in the Original Side Appeal had applied under section 186 of the Companies Act for naming an Advocate-Chairman and fixing the venue of the meeting. Though it was contended that the Court had no power to appoint an Advocate-Chairman, the learned Judge sitting on the Company Side declined to appoint an Advocate on the ground that there was no need therefor. The appeal is from that order. Pending the appeal, a Division Bench of this Court by an order dated 12th September, 1974, on a related application, directed that "the convening of the General Body Meeting of the Respondent herein on 14th September, 1974 be and is hereby stayed pending further orders on this petition". A certified copy of this order, as we find from the record of evidence, was served at the registered office of the Company on 30th September, 1974. Nevertheless, the meeting as notified was allowed to take place the next day. An application for contempt was taken out in consequence against one of the Managing Directors and another. But, on their tendering apology, which the Division Bench accepted since it was unqualified, the contempt petition was closed.

2. C.M.P. No. 10935 of 1974 has been taken out in the form of a Judge's Summons under rule 9 of the Company Court Rules, 1959, read with section 151 of the Code of Civil Procedure, to declare as void, illegal and inoperative the resolutions passed at the meeting of 14th September, 1974. On the other hand, an application has been taken out by the respondents to dismiss the appeal

itself on the ground that it has become infructuous since the meeting had already taken place.

3. In the first instance, these matters were heard by a Division Bench, to which two of us were parties, but because of one or two decisions of this Court rendered by Division Benches, it was considered necessary to refer the matters to a fuller Bench and that is how these matters have come before us.

4. The only question for decision in these matters is whether the resolutions passed at the meeting on 14th September, 1974 can validly stand, notwithstanding the fact that the meeting was held in violation of the inhibitory order aforesaid. What the appellants contend is that, since the meeting was held in violation of the inhibitory order, no wrong-doer in respect thereof should be allowed to derive any benefit out of his own wrong. Alternatively, it is also put that in exercise of the inherent powers of this Court under section 151 of the Code of Civil Procedure, this Court, should in such circumstances, and in order to meet the ends of justice, put back the parties in the same position as they had been immediately before the order staying the proposed meeting was issued. We shall first examine whether in such circumstances this Court can invoke its inherent power under section 151 of the Code of Civil Procedure.

5. Since the matter is not *res integra* the best way to approach the question is to refer to the decided cases and in the light of it, to come to a conclusion. Cases are all agreed that, whether it is a stay order, or an injunction, essentially, there is no difference between them except that in the case of a stay order, it is addressed to the Court concerned, and in the other to the person inhibited from doing a certain thing. There is also no difference that, so far as Order 39 of the Code of Civil Procedure is concerned ,it confers only limited powers and would not be of assistance in circumstances as in the present case. In *Mulraj* v. *Murti Raghunathji*[1] the Supreme Court observed:

> "As we have already indicated, an order of stay is as much a prohibitory order as an injunction order and unless the Court to which it is addressed has knowledge of it, it cannot deprive that Court of the jurisdiction to proceed with the execution before it. But there is one difference between an order of injunction and an order of stay arising out of the fact that an injunction order is usually passed against a party while a stay order is addressed to the Court. As the stay order is addressed to the Court, as soon as the Court has knowledge of it, it must stay its hand; if it does not do so, it acts illegally. Therefore in the case of a stay order as opposed to an order of injunction, as soon as the Court has knowledge of it, it must stay its hand and further proceedings are illegal, but so long as the Court has no knowledge of the stay order, it does not lose the jurisdiction to deal with the execution which it has under the Code of Civil Procedure".

It went on to observe that, though the Court to which the stay order was addressed, when it had no knowledge of the stay order, could not be said to be acting without jurisdiction in making an order contrary to the stay order, nevertheless, it is not powerless to undo any possible injustice that might have been caused to the party in whose favour the stay order was passed during the period till the Court had knowledge of the stay order. The Supreme Court went on:

> "We are of opinion that section 151 of the Code of Civil Procedure would always be available to the Court executing the decree, for in such a case, when the stay order is brought to its notice, it can always act under section 151 and set aside steps taken between the time the stay order was passed and the time it was brought to its notice, if that is necessary in the ends of justice and the party concerned asks it to do so."

On facts, that was a case of stay.

6. In *Manohar Lal* v. *Seth Hiralal*[1], the view was expressed that section 151 of the Code of Civil Procedure,itself said that

1. (1968) 1 S.C.J. 392 : (1967) 3 S.C.R. 84: A.I.R. 1967 S.C. 1386.

1. A.I.R. 1962 S.C. 527.

nothing in the Code should be deemed to limit or otherwise affect the inherent power of the Court to make orders necessary for the ends of justice. It, therefore, follows that Order 39 of the Code of Civil Procedure should not be considered as placing any limit on the scope of the inherent power under section 151. In *N. Senapathi* v. *Sri Ambal Mills*[1], which was quite akin to the circumstances in the instant case, a Division Bench consisting of Anantanarayanan, Officiating Chief Justice and Natesan, J. after accepting the apology and dismissing a petition for contempt for violating an injunction prohibiting the holding of a meeting, observed:

> " Most certainly the proceedings of the meeting were void, the meeting itself having been conducted in disobedience of the interim injunction, and that will equally apply to the resolution or resolutions passed therein. We make a record to that effect. This situation at law has not been disputed by any of the learned counsel."

Though the learned Judges did not give the reason for their view, we are inclined to think, with respect, that the conclusion so drawn is unexceptionable, as we shall show presently.

7. *Subodh Gopal* v. *State of Bihar*[2], and *Hari Nandan* v. *S. N Pandit*[3], are cases of injunction against parties. In the earlier case, a lease deed executed was in violation of an injunction. After holding that Order 39 did not provide for relief, the Court was of opinion that, in exercise of its inherent power, it could set aside the lease deed as it was violative of the injunction order. In *Hari Nandan* v. *S. N. Pandit*[3], a similar view was held and it was said that in such circumstances the parties in the interests of justice should be put back in the same position as they stood prior to the issuance of the order of injunction. This is what the Allahabad High Court said:

> "So far as F.A.F.O. No.251 of 1972 and Civil Revision No. 875 of 1972 are concerned it may be pointed out that the mere fact that the applicants had been dispossessed after the interim injunction order had been issued would not be enough to treat the chapter in regard to possession over the house as closed. If a person has been dispossessed by wilfully disobeying an order of injunction the Court which issued the order of injunction can after considering the circumstances of each case and the conduct of the parties always pass such an order in the ends of justice as would undo the wrong done to the party in whose favour the order of injunction had been issued. The exercise of this inherent power vested in the Court is based on the principle that no party can be allowed to take advantage of his own wrong in spite of the order to the contrary passed by the Court; see *State of Bihar* v. *Usha Devi*[1] and *Magna* v. *Rustam*.[2]

8. In our opinion, the inherent powers of this Court under section 151 of the Code of Civil Procedure are wide and are not subject to any limitation. Where in violation of a stay order or injunction against a party, something has been done in disobedience, it will be the duty of the Court as a policy to set the wrong right and not allow the perpetuation of the wrong doing. In our view, the inherent power will not only be available in such a case, but it is bound to be exercised in that manner in the interest of justice. Even apart from section 151, we should, observe that, as a matter of judicial policy, the Court should guard against itself being satisfied in circumstances like this by holding that it is powerless to undo a wrong done in disobedience of the Court's orders. But in this case it is not necessary to go to that extent as we hold that the power is available under section 151 of the Code of Civil Procedure.

9. Mr. Panchapakesa Ayyar for the respondents, however, contends that our view as indicated above, would prevail only as between the parties in Court, but when third parties have acquired rights by reason of something happening, though it is in contravention or in disobedience of the orders of Court, the

1. (1965) M.L.J. (Crl.) 696 : I.L.R. (1966) 1 Mad. 143 : A.I.R. 1966 Mad. 53.
2. A.I.R. 1969 Pat. 72.
3. A.I.R. 1975 All. 48.

1. A.I.R. 1956 Pat. 455.
2. A.I.R. 1963 Raj. 3.

legal position would be different. He says that, since the resolutions had been passed at the meeting on 14th September, 1974, which had vested rights in third parties it would be beyond the power of this Court to make an order, which will have the effect of affecting or interfering with or setting aside such rights in third parties. In our opinion, the question of third parties rights being affected does not arise in the context. We are concerned with a meeting which had been prohibited and not with what happened at the meeting. If the meeting held was in violation of the Court's order and the parties affected approach this Court and ask for relief on the ground that what happened at the meeting would be destructive of their standpoint, this Court on a consideration of the entire circumstances and facts will have to put back the parties in the position where they stood prior to the holding of the meeting. That is not to say that, in doing so, the Court interferes with third parties' rights. All that this Court would do in such circumstances is that, since the meeting was prohibited, but all the same it was held, in violation of the order of this Court, it would refuse to recognise the holding of the meeting as a legal one. Our attention has been invited for the respondents to *Pushakkal* v. *Mahadeva Pattar*[1]. That was an extreme case where a Karnavan was held to be liable to repay the debt which he had incurred for necessity of the tarwad in contravention of an order forbidding him from incurring debts. The defence in the suit to enforce the debt was that the incurring of the debt was in violation of a prohibitory order. The Court declined to accept the defence. It may be seen at once that the justice of the case demanded that the Karnavan was made liable to the debt, more especially when it was incurred for necessity of the tarward. In that case, the learned Judges confined themselves to a consideration of Order 39 and their attention was not drawn to their inherent power under section 151 of the Code of Civil Procedure. Even if their powers under section 151 had been invoked, in that case too, we have no doubt that the Court would have come to the same conclusion because of the exigencies of justice in that case. In *Balbhaddar* v. *Balla*[1], the Court was concerned with an alienation made contrary to the order of injunction. It was no doubt held that the alienation could not be held to be invalid. But that was solely on the basis of the provisions of Order 39. *Lord Krishna Sugar Mills Limited* v. *Abanash Kaur*[2], which was cited for the respondents, was concerned with a different situation and we do not think it is of assistance in the present case. We are of the view that none of these cases cited for the respondents, which we have referred to above, leads us to the conclusion that this Court cannot legitimately invoke its inherent powers in the present circumstances.

1. 35 M.L.J. 96: 47 I.C. 778.

10. Another contention for the respondents was that the conduct of the appellants and the circumstances of the case showed culpable negligence on their part and on that basis they should be regarded also as wrong doers and should be prevented from deriving a benefit out of their own wrong conduct. We think that this argument is adding insult to injury because, having obtained an interim order of stay of the meeting, and also having served a copy of the order at the registered office, they could not be expected, as the respondents would have it, to attend the meeting and then warn the shareholders at the meeting against passing any resolution contravening the order of this Court. We do not think that there is any substance in this contention of the respondents.

11. On the above view of the matter, we are of opinion that C.M.P.No.10935 of 1974 should be allowed. Accordingly we declare that the parties are put back in the same position as they stood immediately prior to the service of the stay order of this Court, which means that the meeting on 14th September, 1974 and the resolutions passed at that meeting, would have no effect whatsoever.

12. C.M.Ps.Nos.10347, 13855 and 13856 of 1974 will stand dismissed. No costs.

S.J. — *Application No.* 10935 *of* 1974 *allowed; other applications dismissed.*

1. A.I.R. 1930 All. 387 (2).
2. (1974) Com. Cas. 210.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*T. Ramaprasada Rao and S. Maharajan, JJ.*

Rajendrakumar Bhandari.. *Appellant**

v.

Poosammal and others.. *Respondents.*

(A) *Transfer of Property Act (IV of 1882), section 43—Estoppel feeding the grant.*

(B) *Specific Relief Act (XLVII of 1963), sections 13, 17 and 20—"Title free from reasonable doubt"—Meaning—Specific performance—Decree when can be granted.*

(C) *Madras City Tenants' Protection Act (III of 1922), section 2 (4)—Tenant's right to purchase property—Whether creates an interest in immovable property.*

In cases of persons who contract to sell property, but with no title, the purchaser can take advantage of the subsequent acquisition of such title by the vendor, and the law compels the vendor to convey the property, if by a supervening act or otherwise his imperfect title or no title is perfected. This is the well-known principle of feeding the grant by estoppel. If third persons are interested, in the bargain and if the vendor can compel such persons to join in the transfer of such property over which he had no title or had only an imperfect title, then the purchaser can compel the vendor to procure such concurrence or compel such third parties to procure such a conveyance. [*Para.* 9.]

The expression "title free from reasonable doubt", is one very much analogus to the expression "marketable title" adopted by courts of law while interpreting section 55 (2) of the Transfer of Property Act. Title cannot be understood as something equivalent to a process involving making of title. In order to convey property the vendor should have a present right or interest in immovable property which he contracts to convey ; a bare expectancy of getting such a right in course of time which has not reached its end is not the same thing as asserting that he is a person having an interest in immovable property. A title which has not been perfected is no title at all. It is established that the question of title, if raised in a suit for specific performance, has to be decided between the parties so that they may not be exposed to the danger and the extent of a legal contest at a future date. In such circumstances, courts in equity are bound to pronounce upon the efficacy or otherwise of the title in question except perhaps in rare and exceptional cases. Marketable, title is one which both in the strict and reasonable sense means that the vendor would be in a position to force the property concerned on an unwilling purchaser under all circumstances. It should be shown to be free from and not afflicted by doubts. Such doubts, no doubt, ought not to be capricious or frivolous doubts, but which a court of law would be disposed to accept as serious or sufficient. [*Paras.* 11, 12 *and* 13.]

The exercise of discretion either in the matter of grant or refusal of a decree for specific performance ought to be made judiciously and judicially and as section 20 (1) of the Specific Relief Act says, it ought not to be arbitrarily or unreasonably exercised. [*Para.* 15.]

No interest in land is to be gained by the tenant entitled to the protection of the City Tenants Protection Act and it is merely a privilege or personal right, which is only heritable but not transferable. There cannot be a right to sell right or privilege and *a fortiori* it follows that no suit for specific performance of such an agreement of sale of a privilege which is personal can be envisaged by a court of law. [*Para.* 14.]

Case referred to :—

Natesa Mudaliar v. *S.B.K.P.K. Bhajana Matam,* (1966) 1 M.L.J. 130.

Appeal against the decree of the City Civil Court (III Assistant Judge) Madras dated 30th October, 1967 and passed in Original Suit No.4305 of 1964.

V. Srinivasan and *S. Balasubramanian,* for Appellant.

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*Appeal No. 124 of 1968. 19th *June,* 1974

K. Venkataramani, *S.B. Mani*, *V. Subramaniam* and *K. V. Jayaraman*, for Respondents.

The Judgment of the Court was delivered by

Ramaprasada Rao, J. :—The unsuccessful plaintiff in O.S.No.4305 of 1964 on the file of the City Civil Court, Madras, is the appellant. The first defendant is a lessee of a piece and parcel of land measuring 780 sq. ft. in R.S. Nos. 35/1 and 32 in Nungambakkam, Mackay's Gardens, Thousand Lights, Madras. Admittedly defendants 2 to 5 are the owners of this property. Exhibits A-3. to A-5 evidence such a lease of the land in favour of the first defendant. It appears that the first defendant put up a structure on the land so leased out to her by defendants 2 to 5 and gained an entitlement under the provisions of the City Tenants Protection Act to purchase the land over which the superstructure was put up by her, as and when she was sought to be evicted by the owners. It is common ground that defendants 2 to 5 filed an ejectment suit, No. 35 of 1960, on the file of the Court of Small Causes, Madras, for eviction of the first defendant. The first defendant thereafter, pursuant to her statutory rights under the City Tenants Protection Act, filed the usual application under section 9 thereof and obtained the necessary order entitling her to purchase the suit land from defendants 2 to 5. This appears from Exhibit A-1 and under the said judgment of the Court and the ancilliary orders under section 9 she was enabled to purchase the land for a sum of Rs. 1,950 and she was also given the concession of paying the same in instalments. It appears that the first defendant defaulted at one time in the payment of instalments but such a delay in the payment of instalments towards the purchase price was condoned by an order of the Court of Small Causes under Exhibit A-2, dated 21st September, 1964.

2. Whilst things remained so nebulous and uncertain, in so far as the title of the first defendant to the land in question was concerned, she appears to have entered into an agreement under Exhibit A-9, dated 7th November, 1962, in and by which she agreed to sell the above piece of land to the plaintiff for a consideration of Rs. 6,000. The usual terms were incorporated in the said agreement. It is also equally common ground that, pursuant to the said agreement of sale, the plaintiff paid a sum of Rs. 100 to the first defendant on the date of the agreement, a sum of Rs. 1,301-2-0 to the credit of the ejectment suit No. 35 of 1960 on the file of the Court of Small Causes, and a further sum of Rs. 1,61.25 towards the decree debt of the first defendant. The plaintiff claims that he paid, in addition a sum of Rs. 1,070.30 towards the sale price. In all, the plaintiff claims that he paid a sum of Rs. 2,632.75 and was awaiting the completion of the sale. He further alleges that on 21st December, 1964 the first defendant entered into a compromise with the owners, defendants 2 to 5, pursuant to which the first defendant delivered vacant possession of the land to the owners and got sufficient compensation therefor. It is further alleged by the plaintiff that the said compromise was a collusive one, that defendants 2 to 5 knew the rights which the plaintiff had under Exhibit A-9 and that defendants 2 to 5 are equally bound by the agreement of sale entered into by the first defendant with him. Lastly he claims that he was ever ready and willing to perform his part of the contract to obtain the land by paying the balance of the purchase price. Hence he prayed for a decree for specific performance of the agreement covered by Exhibit A-9.

3. The first defendant's case, *inter alia* was that the structure erected on the land did not belong to her, but was constructed by one Appu Nair, who was maintaining her for the past twenty-five years. She denied having received the sum of Rs. 1,070·30, though she admitted the other amounts referred to by the plaintiff. She would also allege that she was not aware of the contents of Exhibit A-9, that she only signed a blank paper and that the plaintiff was making use of it, and, in that context, she would plead that there was no agreement of sale at all. She would further allege that there were negotiations between Appu Nair and defendants 2 to 5 and that finally in the ejectment suit already referred to there was a compromise between the

owners and herself resulting in her surrendering vacant possession of the land on receipt of the requisite and agreed compensation. She would say that she was ready and willing to pay the plaintiff the sum of Rs. 1,562.12 which, according to her, was the admitted amount received by Appu Nair on her behalf. She would legally contend that, even if the agreement were true, it was not capable of specific performance, since she had no saleable interest in the property, at the time when the agreement was entered into, and, as there was no decree passed in the ejectment suit and as the plaintiff had not obtained title to or a right of assignment over the property in her favour in a manner known to law, the plaintiff was not entitled legally to enforce the so-called contract or agreement of sale.

4. Defendants 2 to 5 referred to the compromise entered into on 21st December, 1964 which date was prior to the present action for specific performance and claimed that the plaintiff was not entitled to the relief asked for, as, on the date of the suit, they were in possession of the property as owners

5. On the above pleadings the following issues were framed:

1. What are the amounts advanced by the plaintiff to the first defendant ?

2. Is this suit for specific performance not maintainable ?

3. Is this suit barred by *res judicata* ?

4. Had the defendants 2 to 5 no knowledge of the suit agreement between the plaintiff and the first defendant ?

5. Is the suit agreement incapable of being specifically performed ?

6. To what reliefs is the plaintiff entitled ?

6. The learned City Civil Judge found that the agreement was true and binding on the first defendant and defendants 2 to 5 had no knowledge of Exhibit A-9. On the crucial question of law arising in this case, he held that the plaintiff had no assignable or transferable right in the suit property and that under the provisions of the City Tenants Protection Act the first defendant as tenant had only a personal right to obtain a sale of the property from the landlords who professed to evict her from the premises and on that ground, and relying upon certain decisions of the Supreme Court and this Court, the learned Judge found that the privilege which the first defendant could at all secure under the Act was not a transferable one. If therefore the right bartered for personally under Exhibit A-9 is not one which is assignable or transferable in the eye of law, no decree for specific performance could be granted. In that light and in his discretion the learned Judge dismissed the suit. On issue No. 3 he stated that it was not argued before him and so he did not render any finding. On issue No. 1, there is no finding of the learned Judge as to what exactly was the amount advanced by the plaintiff to the first defendant. We, however, consider it unnecessary in the instant case, in the light of the opinion which we propose to render, to find out what exactly was the amount due and payable by the first defendant to the plaintiff. It is equally unnecessary for us to touch upon issue No. 3 relating to *res judicata* as it was not even argued before us. The crucial question for consideration, in this appeal by the plaintiff in the suit therefore is whether the plaintiff is entitled to a decree for specific performance of the agreement of sale dated 7th November, 1962 (Exhibit A-9).

7. Learned counsel for the appellant urges that the plaintiff is entitled to a decree for specific performance, since a concluded contract of sale was entered into and that, though in point of time on the date when the agreement was entered into, the first defendant did not have a transferable right, she could obtain the same by diligently paying off all the instalments of purchase price and by keeping the contract alive. On the other hand, learned counsel for defendants 2 to 5, who are the real contestants, in this appeal, would say that, on the date when the suit was filed, the first defendant had no right at all in the property and that, therefore, in equity the plaintiff was not entitled to a decree for specific perfor-

mance as against the first defendant which would result in hardship to the other defendants. In addition, it is contended that what was sought to be sold under Exhibit A-9 was an imperfect or inchoate right which had not perfected itself into an assignable or transferable right in a manner known to law and that in those circumstances the plaintiff is not entitled to the relief asked for. It is further contended that at or about the time when the agreement was entered into, the first defendant did not have a marketable title or title free from doubt or even any title to the property and that in that sense the plaintiff ought to be non-suited.

8. The subject-matter of the suit is obviously a bare expectancy of the first defendant to get a complete interest in the land in question. It is no doubt true that she obtained the usual order from the Court of Small Causes, when she was confronted with the suit in ejectment, whereunder her rights to obtain a sale of the land were declared. That declaration was in the presence of defendants 2 to 5. But such a right was still in the stream of justiciability which was likely to ripen itself into a full fledged proprietary right in the 1st defendant and which is capable of being assigned or transferred or otherwise dealt with only by his diligent conformance to the obligations to which the first defendant was welded in law. We have already seen that the first defendant defaulted and no one knew whether she would have committed a second default thereafter as well. On the date of the suit, it is not pretended that the first defendant had no right known to law in the land. When Exhibit A-9 was drawn up, the subject matter therein was an inchoate right which was still in the arena of judicial process and had not reached the ultimate destination for its being recognized by Courts of law as an interest in land which was transferable and assignable. We would refer to sections 13 and 17 of the Specific Relief Act (XLVII of 1963) and section 55 (2) of the Transfer of Property Act. Section 13 speaks of the rights of a purchaser against a person without any title or a person with imperfect title. Section 13 (1) says that where a person contracts to sell, having no title or only an imperfect title, the purchaser has the rights enumerated in the sub-section. *Inter alia*, one such right is that, if the vendor has subsequent to the contract acquired any interest in the property, the purchaser may compel him to make good the contract out of such interest. Secondly, where the concurrence of other persons is necessary for validating the title and such other persons are bound to concur at the request of the vendor, the purchaser may compel him to procure such concurrence and when a conveyance by other persons is necessary to validate the title and they are bound to convey at the request of the vendor, the purchaser may compel him to procure such conveyance. The other rights referred to in the sub-section are not necessary for the purpose of this case.

9. It is thus seen that in the case of persons who contract to sell the property, but with no title, the purchaser can take advantage of the subsequent acquisition of such title by the vendor, and the law compels the vendor to convey the property, if by a supervening act or otherwise his imperfect title or no title is perfected. This is on the well-known principle of feeding the grant by estoppel. Again, if third persons are interested in the bargain and if the vendor can compel such persons to join in the transfer of such property over which he had no title or had only an imperfect title, then the purchaser can compel the vendor to procure such concurrence or compel such third parties to procure such a conveyance. In the instant case it is not stated that the vendor, who had no title or at any rate had only an imperfect title in the nature of the statutory right to purchase the property, subsequently acquired any better right over the property so as to convey the totality of the rights in the land to the plaintiff as purchaser. Nor is it urged before us that defendants 2 to 5 are obliged to the first defendant to join with her in validating her title for the purpose of conveyance of the property to the purchaser or join in the conveyance which the first defendant is bound to execute at a future date in favour of the purchaser pursuant to

the agreement of sale. The two conditions therefore which are necessary before the purchaser can secure the equitable remedy of specific performance against the vendor and/or third persons are conspicuously absent in the instant case. As already stated, the first defendant did not subsequently acquire any further interest in the property. Defendants 2 to 5 are not persons who are obliged to concur with the vendor in validating her title or join in the execution of the sale deed in favour of the plaintiff.

10. We shall now refer incidentally to section 17 which, of course, refers to contracts of sale by one who has no title to the property, but which cannot be specifically enforced in favour of the vendor. Section 17 says:

11. A contract to sell or let any immovable property cannot be specifically enforced in favour of a vendor or lessor—

(*a*) who, knowing himself not to have any title to the property, has contracted to sell or let the property;

(*b*) who, though he entered into the contract believing that he had a good title to the property, cannot at the time fixed by the parties or by the Court for the completion of the sale or letting, give the purchaser or lessee a title free from reasonable doubt.

The expression "title free from reasonable doubt" is a provision which is very much analogous to the expression "marketable title" adopted by Courts of law while interpreting section 55 (2) of the Transfer of Property Act.

12. The immediate question which we are bound to consider is what is the marketable title or title free from reasonable doubt. Title cannot be understood as something equivalent to a process involving making of title. In order to convey property the vendor should have a present right or interest in immovable property which he contracts to convey; a bare expectancy of getting such a right in course of time which has not reached its end is not the same thing as to assert that he is a person having an interest in immovable property. A title which has not been perfected and which cannot rationally be said to be free from doubt is no title at all. It is established that the question of title, if raised in a suit for specific performance, has to be decided between the parties so that they may not be exposed to the danger and extent of a legal contest at a future date. In such circumstances, Courts in equity are bound to pronounce upon the efficacy or otherwise of the title in question except perhaps in rare and exceptional cases. The case in question does not present such rare or exceptional circumstances. The first defendant failed once in her endeavour to perfect her right to purchase the property, as she defaulted in the payment of the instalments which she had been directed to pay by the Court to obtain an indefeasible title to the property under the provisions of the City Tenants Protection Act. It is not clear from the record whether after 21st September, 1964, when the delay in the payment, of the earlier instalments was condoned the first defendant kept up her obligation to pay the instalments and kept alive her statutory right to obtain possession. The 1st defendant did not have a marketable title or a title free from doubt over the land. On the other hand, it is not disputed before us that on 21st December, 1964 the first defendant surrendered possession of the land to the owners. That would mean that there was a definite snapping in the chain of causation which thwarted the incomplete statutory right possessed by the first defendant to obtain the property under the provisions of the City Tenants Protection Act and resulted in a complete giving up of that right by an overt act on the part of the first defendant when she compromised with the owners and surrendered possession. The finding of the Court below, with which we agree, is that defendants 2 to 5 cannot at all be imputed with knowledge of Exhibit A-9. There is no convincing reason for us to hold that they had anything to do with Exhibit A-9 or its contents. There could therefore have been no collusion between the first defendant and defendants 2 to 5 as alleged by the plaintiff. The plaintiff himself does not dispute that there has been a surrender of the land by the first defendant in favour of defendants 2 to 5. That was done

prior to the suit, but after the agreement. As we said, the agreement, to convey was only in respect of a right which had not fruitioned into a transferable or assignable right. Before the plaintiff came to Court, the first defendant did not have any interest in the land, as she had surrendered vacant possession of it to defendants 2 to 5. The vendee in his turn lost his right to ask for specific performance of the contract. It is in these circumstances that we should consider whether the plaintiff, though formally ready and willing to perform his part of the bargain under Exhibit A-9, is entitled to specific performance.

13. We have already referred to sections 13 and 17 of the Specific Relief Act. Under no circumstances the plaintiff has or had on the date of the suit any equitable right to claim the equitable relief of specific performance. Therefore, the question whether the first defendant's title to the land in question was free from reasonable doubt or whether the first defendant had a marketable title sinks into insignificance so far as this case is concerned. But, in order to make it complete, we may express the view that at no point of time did the first defendant have any marketable title or any title which was free from doubt. As the records disclose that the first defendant herself committed default, we have already observed that the possibility of a second default could not be ignored. If the first defendant committed a second default, she would lose her statutory right to purchase the property. It is in this sense that the first defendant's right, which is the subject-matter of this action, cannot be characterised as an interest in immovable property over which she could be said to have a marketable title or title free from reasonable doubt. Marketable title is one which both in the strict and reasonable sense means that the vendor would be in a position to force the property concerned on an unwilling purchaser under all circumstances. It should be shown to be free from and not afflicted by doubts. Such doubts, no doubt, ought not to be capricious or frivolous doubts, but which a Court of law would be disposed to accept as serious or sufficient. If, therefore, the first defendant had no title or, in any event, had no marketable title or a title free from reasonable doubt, it follows that the plaintiff is not entitled to specific performance, as a matter of right.

14. The subject can also be viewed from a different perspective. Under section 2 (4) of the City Tenants Protection Act a 'tenant' in relation to any land includes, under sub-clause (*c*) of clause (*ii*) the heirs of such a person. Considering the quantity and quality of this statutory right the Supreme Court and this Court have taken the view that such a right is not a right over property. In fact, the Supreme Court has strongly expressed that the fact that such a right stems from a statute cannot expand its contents or make it any the less a non-proprietary right. Again in *Natesa Mudaliar* v. *S.B.K.P.K. Bhajana Matam*[1], this Court has held that what is acquired by the tenant under the provisions of the City Tenants Protection Act is not any vested interest in the land, but only an option to purchase the land by reason of the beneficial provisions thereof, and characterised it as a privilege conferred on the tenant by the Act. The learned Judges further held that, being such a right to purchase the property, it did not create any interest in immovable property. What is, however, necessary is to find out, whether such a right, which does not create any interest in immovable property, is assignable or can be made the subject-matter of a bargain under an agreement of sale. We think that it cannot be done. As no interest in land is to be gained by the tenant entitled to the protection of the City Tenants Protection Act, and as it is merely a privilege or personal right which is only heritable, but not transferable, we are of the view that there cannot be a right to sell that right or privilege, and *a fortiori* it follows that no suit for specific performance of such an agreement of sale of a privilege which is personal can be envisaged by a Court of law.

15. Lastly we are also of the view that we are not inclined to exercise our discretion under section 20 of the Specific Relief Act, as, in our view, the plaintiff is not entitled to the equitable relief

1. (1966) 1 M.L.J. 130.

asked for. The exercise of discretion either in the matter of grant or refusal of decrees for specific performance ought to be made judiciously and judicially, and, as section 20 (1) says, it ought not to be arbitrarily or unreasonably exercised. In the instant case, we have already referred to the most important fact that on the date when the suit was filed for the grant of a decree for specific performance, the first defendant had already surrendered possession of the land and she had no interest, either personal or otherwise, in the land. Again, it has to be borne in mind that the first defendant, who is only a lessee, has an inherent right to surrender the lease-hold right or interest, and even the plaintiff cannot prevent or in any way obstruct her from doing so. If, therefore, on the date of the suit the first defendant, by an acceptable act, surrendered her rights, whatever they were, in the land, then it would be most harsh to grant a decree for specific performance of an agreement of sale of a property which had become the property of third parties. By such a grant defendants 2 to 5 would be seriously prejudiced. We would be granting a decree for specific performance of an agreement of sale against a party or person who had neither knowledge nor was a party to the contract of sale. That would be most inequitous, besides being unjust. We are therefore of the view that under section 20 of the Specific Relief Act, we are not inclined to exercise our discretion to grant the equitable relief of specific performance to which, for all the reasons stated above, the plaintiff is not entitled.

16. The appeal therefore fails and it is accordingly dismissed with costs.

R.S. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao and S. Ratnavel Pandian, JJ.*

Khivraj Chordia and others .. *Appellants**

v.

Esso Standard Eastern Inc. .. *Respondent.*

(A) *Interpretation—Interpretation of written documents—Liberal construction to be adopted.*

(B) *Contract Act (IX of 1872), section 29.*

It is fundamental that notwithstanding the restrictions and qualifications imposed by operation of technical rules, a liberal construction of written documents is to be made, because of the simplicity of the laity, and with a view to carry out the intention of the parties and uphold the document. It is also well-established that words used in written instruments ought to be made subservient not contrary to the intention of the parties. It is necessary in such circumstances, to find the real import of the situation by the use of the prescribed yardstick under the contract itself and render justice to the parties. The well-known maxim is *aequam et bonum est lex legum*, which means that which is equal and good is the law of laws. It would be the duty of Courts to interpret liberally written instruments with reference to the intention of parties and far from avoiding an instrument, should attempt to further the intention of the parties by adopting the instrument and thus doing substantial justice between the parties. *Ita scriptum est* is the first principle of interpretation of documents. But to this, a necessary corollary is always annexed with a rider compelling parties or Courts, if they are called upon to interpret an instrument, to bear in mind not only the script of the instrument, but also the *sententia*, that is the intention of the parties, as inhered in the instrument itself.

[*Paras.* 5, 8 *and* 13.]

* Appeal Nos. 498 and 499 of 1970.

29th November, 1974.

Cases referred to:—

State of West Bengal v. *M/s. B. K. Mondal*, (1962) 1 S.C.R. (Supp.) 876: A.I.R. 1962 S.C. 779; *Kovuru Kalappa Devara* v. *Kumar Krishna Mitter*, (1944) 2 M.L.J. 225: I.L.R. (1945) Mad. 521 : 57 L.W. 499: A.I.R. 1945 Mad. 10; *Hitkarini Sabha* v. *Jabalpur Corporation*, A.I.R. 1961 M.P. 324; *Hem Chandra Choudary* v. *Ajudhya Bala Choudary*, A.I.R. 1969 Assam 43; *Jai Ram* v. *Hari Singh*, A.I.R. 1967 Punj. 159; *New Beerbhoom Coal Co.* v. *Bularam Mahata*, 7 I.A. 107 : I.L.R. 5 Cal. 932 P.C.: (1879) 7 L.L.R. 247; *Sree Sankarachari Swamiar* v. *Varada*, I.L.R. 27 Mad. 332 ; *Secretary of State for India-in-Council* v. *Volkart Brothers*, I.L.R. 50 Mad. 595: 52 M.L.J. 443 : A.I.R. 1927 Mad. 513; *H. V. Rajan* v. *C. N. Gopal*, A.I.R. 1961 Mys. 29; *D. T. Mangalmurti* v. *State of Bombay*, 1959 S.C.J. 760 : A.I.R. 1959 S.C. 639.

Appeals against the decree of the Third Assistant Judge, City Civil Court, Madras, dated 2nd April, 1970 and passed in Original Suit Nos. 98 of 1970 and 2434 of 1969.

C. S Prakasa Rao and *V. A. Sadagopan*, for Appellant.

Miss Janaki Krishnan, for Respondent.

The Judgment of the Court was delivered by

Ramaprasada Rao, J.—The plaintiffs in O.S. No. 2434 of 1969 and the defendants in O.S. No. 98 of 1970 on the file of the City Civil Court, Madras, are the appellants in both the appeals. The appellants shall be hereinafter referred to as Khivraj Chordia. The respondents in both the appeals are Esso Standard Eastern Inc., hereinafter referred to as Esso. They were the defendants in O.S. No. 2434 of 1969 and the plaintiffs in O.S. No. 98 of 1970. Khivraj filed a suit for recovery of vacant possession of the suit site from Esso on the foot that the period of lease granted to them under Exhibit A-1, dated 16th January, 1959 has expired by efflux of time and that Esso was no longer entitled either under law or by contract to remain in possession of the suit site in the absence of a renewal of the lease as contemplated therein. The prior correspondence between the parties such as Exhibits A-2 to A-7, disclose the mind of Khivraj Chordia to obtain vacant possession of the site, which Esso resisted on the ground that under the terms of the lease-deed Exhibit A-1 and in particular under Clause 3 (*d*) of the same, they were entitled to be in possession of the same and that they were not liable to be evicted. In answer to the suit for possession Esso filed a replicatory suit O.S. No. 98 of 1970 seeking for specific performance of the contract to renew the lease under the terms of Exhibit A-1 for a further period of 10 years commencing from 1st February, 1969. Esso's main contention is that clause 3 (*d*) of the lease reflects "certain" terms, which would compel Khivraj Chordia to cause a renewal of the lease in accordance with the tenor of the terms therein and the mere circumstance that Khivraj and Esso would not mutually agree to a just rent to be paid by Esso during the extended period of the lease sought to be demised would not compel them to surrender vacant possession. Thus, Khivraj Chordia's suit for eviction was countered by a suit for specific performance by Esso. These two suits were tried together and a common judgment was rendered by the Court below, who framed the following issues for trial.

O.S. No. 2434 *of* 1969 :

1. Whether the plaintiffs are entitled to recover vacant possession of the suit property from the defendant ?

2. Whether the plaintiffs are estopped from claiming possession of the demised premises except in accordance with the terms of the lease agreement dated 16th January, 1969 ?

3. Whether clause 3 (*d*) of the lease deed by and under which the option to renew the lease is sought to be exercised is vague, inoperative and unenforceable ?

4. To what relief, if any are the plaintiffs entitled ?

O.S. No. 98 *of* 1970.

1. Whether the clause for renewal in the lease deed is void and inoperative due to vagueness ?

2. Whether the defendants are liable to grant a renewal of the lease as claimed by the plaintiffs and if so what are the terms on which the renewal is to be granted ?

3. Whether the clause for renewal cannot be enforced for want of mutuality ?

4. What relief are the parties entitled to ?

The learned Judge after interpreting the particular recital and covenant in Exhibit A-1 came to the conclusion that the suit for possession filed by Khivraj Chordia deserved a dismissal and that of the Esso for specific performance merited a decree. In the result, he dismissed O.S. No. 2434 of 1969 and decreed O.S. No. 98 of 1970 declaring that a rent of Rs. 2,000 per month is the fair and reasonable rent, which in the circumstances, Esso should pay to Khivraj Chordia and directed the latter to specifically perform the contract of lease by entering into lease with Esso for a period of 10 years commencing from 1st February, 1969 in respect of the suit site and made it clear that the other terms and conditions, other than clause 3 (*d*) as contained in Exhibit A-1 should be incorporated in the new lease deed to be executed as between the parties. He decreed the suit for specific performance with costs, but dismissed the suit for eviction without costs. As against this, the present two appeals have been filed.

2. A.S. No. 498 of 1970 is a regular appeal against the judgment and decree in O.S. No. 98 of 1970 and A.S. No. 499 of 1970 is the appeal against the judgment and decree of the Court below in O.S No. 2434 of 1969.

3 Mr. V. K. Thiruvenkatachari, appearing for Khivraj Chordia, after referring to clause 3 (*d*) of Exhibit A-1, which is the only clause, which has to be interpreted in these appeals, contends that the covenant for renewal is conditioned by the fixation of a rent, which is to be mutually agreed to between the parties having due regard to the rents prevailing in the same locality and that such a condition is an uncertain one within the meaning of section 29 of the Indian Contract Act and as all contracts, which are uncertain or whose terms can not be made certain, are void in the eye of law, the decree for specific performance asked for by Esso ought not to be granted and the relief for eviction prayed by Khivraj ought to have been given by the Court below. Mr. Dulipsingh, appearing for Esso on the other hand, would say that clause 3 (*d*) is not so very ambiguous or ambulatory as to make the covenant projected therein as an uncertain one or a condition which could not be made certain by exercise of a reasonable mind to find out the real intention between the parties. According to him the clause as to fixation of rent provides the yardstick by which a just rent could be agreed to between the parties and as the means to achieve that end is also contained in the said clause, it could be made certain by an easy process and as Khivraj was avoiding the adoption of such an agreed process to arrive at the equitable rent, he was avoiding the performance of the contract and that, therefore, the Esso's suit for specific performance has rightly been decreed.

4. It is in the light of the above respective contentions, the subject-matter has to be viewed and adjudicated upon.

5. It is not in dispute that on 16th January, 1959 the Standard Vacuum Oil Company (the predecessors of Esso) entered into a lease-deed with the Madras Club, which was again the predecessors-in-interest of Khivraj Chordia, in so far as the suit property is concerned, whereunder Esso was permitted to occupy the suit property, which was a piece and parcel of land measuring about 150′ x 100′ on Mount Road, for a period of 10 years paying the agreed rent of Rs. 1,250 per month. *Inter alia* the lease deed contained a clause for renewal of the lease. This clause 3 (*d*) runs as follows:

> "That the landlord will on the written request of the tenant made 2 calendar months before the expiry of the term hereby created and if there shall not at the time of such request be any existing breach or non-observance of any of the covenants on the part of the tenant herein before contained grant to it a lease of the demised premises for the further term of ten years from the expiration of

the said term containing like covenants and provisos as are herein contained and at a rent to be mutually agreed between the parties hereto due regard being paid to rents then prevailing in the same locality".

While interpreting the tenor, text, intention and the meaning of this clause, controversies arose between the parties. It is fundamental that notwithstanding the restrictions and qualifications imposed by operation of technical rules, a liberal construction of written documents is to be made, because of the simplicity of the laity, and with a view to carry out the intention of the parties and uphold the document. It is also well established that words used in written instruments ought to be made subservient, not contrary to the intention of the parties. Taking Exhibit A-1 as a whole and placing ourselves in the arm-chair of the respective parties at the time when the original lease deed was forged as between themselves, it would not be difficult for us to cut through the cobweb of expression, and find the real intention between the parties. When the clause for renewal was incorporated in the lease deed, the parties expected and agreed as between themselves that such a clause should ordinarily be given effect to. If the *modus operandi* for achieving the ultimate result of renewing the lease is clear and explicit and if the working rule agreed to is capable of being made certain and under the guidelines prescribed in the written instrument (in particular, under clause 3 (*d*) of Exhibit A-1) substantial justice could be advanced by implementing the true intent of the parties, then the Courts ought not to be chary to avoid the instrument on one or the other rule of technicality. As law and application of law is always understood as the dictate of reason and it cannot be wanting in dispensing justice, it is necessary, in such circumstances, to find the real import of the situation by the use of the prescribed yardstick under the contract itself and render justice to the parties. The well-known maxim is *aequam et bonum est lex legum*, which means that which is equal and good is the law of laws. It is in this framework of such well accepted legal and equitable principles, the rights and liabilities of the parties in this litigation have to be adjudged.

6. Clause 3 (*d*) read in the context in which it appears *ex facie* reflects the clear and unequivocal mind of the parties that Khivraj, should grant a lease of the demised property for a period of ten years from the expiration of the first term under similar covenants and provisos contained therein provided that Esso should make a request to that effect two calendar months before the expiry of the first term. Thereafter, conjunctively the most disputed clause is introduced. The rent payable by Esso for the extended period shall be mutually agreed upon between the parties hereto, due regard being had to rents then prevailing in the same locality. The mandate which could be culled out from the last facet of the covenant is that the parties shall mutually agree for the payment and acceptance of the rent, which rent has to be fixed with reference to the rents prevailing in the locality. It cannot be said that the rents prevailing in the locality for similar properties cannot be found or deciphered. It cannot equally be said that after such an enquiry into the reasonable rent, it would be impossible for the parties to agree upon that just resultant of that enquiry as the rent payable by one to the other. If the covenant is attacked on the ground that it is uncertain, then it should be *ex facie* uncertain or it is incapable of being made certain. As the measure to be adopted for the fixation of a rent is indicated in the special covenant under consideration, the only aspect, which would arise for consideration, would be, whether the said yardstick or measure is so very ambiguous, ambulatory and uncertain so that no possible result can be achieved by the adoption of such prescribed means as agreed to between the parties. It cannot be said that in the instant case it would be impossible or difficult to fix the rent, which ultimately could be justly characterised as the fair rent payable by Esso after due adoption of the means prescribed under the clause. As the legitimate adoption of the formula can lead to a just result, we are of the view that there is no ambiguity in clause 3 (*d*) and, in any event, it cannot be said that

the agreement between the parties cannot be made certain by invoking the agreed process in the very clause.

7. Mr. V. K. Thiruvenkatachari, relying on section 29 of the Indian Contract Act, which runs:

> "Agreements, the meaning of which is not certain, or capable of being made certain, are void."

says that the covenant in clause 3 (*d*) of Exhibit A-1 is not capable of being made certain. After prefacing his argument that a resort to English law is not justified for deciding a question arising on an Indian statute, unless it is such that it cannot be reasonably understood without such assistance, (Vide *State of West Bengal* v. *M/s. B. K. Mondal*[1], the learned counsel referred to the well-known maxim *certum est quod certum reddi potest* which means that is sufficiently certain which can be made certain and says that there is no sufficient hypothesis or guideline in clause 3 (*d*) of Exhibit A-1 to arrive at a certain rent, which is to be paid by Esso to Khivraj Chordia for the extended period. Strong reliance is placed upon the decisions in *Kovuru Kalappa Devara* v. *Kumar Krishna Mitter and another*[2], and *Hitkarini Sabha* v. *Jabalpur Corporation*[3], and *Hem Chandra Choudary* v. *Ajudhya Bala Choudary and others*[4].

8. In *Kovuru Kalappa Devara* v. *Kumar Krishna Mitter and another*[2], a division Bench of our Court, with reference to section 29 of the Contract Act interpreted the provision in an agreement "to pay a certain sum after deductions as would be agreed upon". The learned Judges held that the expression "after deductions as would be agreed upon" rendered the document vague and that the claim was unenforceable because of section 29 of the Contract Act. That was a case where the agreement did not provide for the working method by which the deductions could be agreed upon. The word "deductions" was left as vague as it could ever be. It was in those circumstances, King, J., speaking for the Bench, said that the Court was not called upon to decide between conflicting claims put in by both sides as to the meaning of a document, since it was so vaguely expressed. In *Hitkarini Sabha* v. *Jabalpur Corporation*[1], the clause which came up for consideration was in these terms. In that case the lease deed contained a covenant of renewal entitling the lessee for it, "on such terms and conditions as may be agreed". The learned Judges interpreting the said clause held that the clause was uncertain and vague and cannot be the basis of a valid contract for renewal of the lease. In that very decision, the learned Judges expressed this as follows:

> "Normally in a covenant for renewal there is an express agreement that the lease would be continued on the same terms and conditions subject to a reservation that the rent may be enhanced under certain circumstances".

Having referred to such a normal situation, the learned Judges observed that as all the terms and conditions under which the rent has to be fixed have been left to the agreement of parties which may not take place at all they held that the clause for renewal was unenforceable because of its uncertainty. Here again we find that there was no measure by which the parties intended to work out their respective rights and obligations but left it to be arrived at on a future agreement which might or might not take place. That is not the case in the appeals under consideration. The decisions cited by the learned counsel for the appellants obviously make a marked distinction between the line of cases where the parties fixed the measure by which they could agree to a particular thing being done and which would be the *sine qua non* for the renewal of a lease and the other cases where no such guidelines or hypothesis were fixed but such an agreement as to rent etc. for the extended period was left uncertain, besides being vague. Only in the former cases and not in the latter it appears to us that section 29 would be inapplicable. We have already

1. (1962) 1 S.C.R. (Supp.) 876 : A.I.R. 1962 S.C. 779.
2. (1944) 2 M.L.J. 225 : I.L.R. (1945) Mad. 521 : A.I.R. 1945 Mad. 10.
3. A.I.R. 1961 M.P. 324.
4. A.I.R. 1961 Assam 43.

1. A.I.R. 1961 M.P. 324.

made it clear that it would be the duty of Courts to interpret liberally written instruments with reference to the intention of parties and far from avoiding an instrument, should attempt to further the intention of the parties by adopting the instrument and thus doing substantial justice between the parties.

9. Countering the above contentions, Mr. Dulip Singh stresses on the language of section 29 of the Act and on the strength of decided cases, urges that the clause under consideration is one, which could be worked to certainty and thus made certain and even if the process to reach the end requires the aid of Court for its determination, it cannot be said that the renewal clause has to be ignored and held to be void on the ground of uncertainty. He also rightly invited our attention to the fact that the suit for specific performance laid by him is the proper course to be adopted. In fact, his contention is that the suit for specific performance, which was filed as an answer to the suit in ejectment, was only by way of abundant caution and that he was entitled to raise such rights inhered in Esso as a defence in the suit for ejectment. He relied upon the observations of the Punjab High Court in *Jai Ram* v. *Hari Singh*[1], with which we are in respectful agreement. The Court said:

> "If a person entitled to obtain possession by a suit for specific performance is already in possession of the property and is sought to be ejected by the other party to the covenant which is suggested to be specifically enforceable it may not be fair to direct the person in possession to file a suit for enforcing his rights and denying him the liberty of claiming to continue in possession as a defence in a suit for ejectment in exercise of the same right".

As, according to the learned counsel the rights projected under clause 3 (*d*) of Exhibit A-1 are enforceable and are not to be ignored as void for being uncertain, the suit for specific performance has been well laid. We agree with this contention. But the more important point is, whether the covenants in the renewal clause are such that it could be made certain by the adoption of the working rule indicated therein.

1. A.I.R. 1967 Punj. 159 at 162.

10. In *New Beerbhoom Coal Company* v. *Bularam Mahata*[1] the Court was interpreting a clause, which is, though not *in pari materia*, very similar to the clause in the instant case. There, the relevant portion of the clause read as follows:

> "If you take possession, according to your requirements, of extra land over and above this patta, we shall settle such land with you at a proper rate. There at we shall make no objection."

Interpreting this clause, Their Lordships expressed the view:

> "They cannot think that in the present case the Court, upon a proper inquiry, would have been unable to determine it. There might have been considerable difficulty in fixing the rate: but difficulties often occur in determining what is a reasonable price or a reasonable rate, or in fixing the amount of damages which a man has sustained under particular circumstances. These are difficulties which the Court is bound to overcome".

This case is an authority for the proposition that a contract to grant a patta at a proper rate was not void for uncertainty, as upon a proper enquiry, the Court would be in a position to determine what is a proper and reasonable rent.

11. In *Sree Sankarachari Swamiar* v. *Varada Pillai*[2], there was a clause in a patta, which provided that in the event of the tenant raising wet cultivation on dry land with Sircar water, he should pay increased rent *according to the rent of the neighbouring wet lands*. A Division Bench of our Court held that such a clause was not bad for indefiniteness. Subramania Ayyar, J., speaking for the Bench expressed that in such cases the Courts had to decide the question as to what is fair and proper and said:

1. (1879) I.A. 107 : I.L.R. 5 Cal. 972 (P.C.) : 7 P.L.R. 247.
2. (1904) I.L.R. 27 Mad. 332.

"And it is scarcely necessary to say that in determining objections founded on the alleged uncertainty of a term in a contract, the test to be applied would be not whether the term is in itself certain but whether it is capable of being made certain. *Id certum est quod reddi certum potest.*"

Secretary of State for India in Council v. *Volkart Brothers*[1] is the nearest case on the point. In that case, a difference of opinion was expressed as between Krishnan, J. and Venkatasubba Rao, J. and on a reference under section 98 Code of Civil Procedure, Coutts Trotter, Chief Justice, agreed with Venkatasubba Rao, J. and held that the covenant for renewal in that case was not uncertain. The relevant portion of the clause read:

"Upon such terms and conditions as shall be judged reasonable".

Krishnan, J. while recording his note of dissent with Venkatasubba Rao, J. would observe:

"No doubt where there is a term to pay a "reasonable" rent or a 'fair' or 'proper' rate or to hold on 'usual terms and conditions' the contract could be made certain by taking evidence and it could therefore be enforced".

But, however, he was inclined to hold that the clause "upon such terms and conditions as shall be judged reasonable", was bad for uncertainty. Venkatasubba Rao, J. on the other hand, relying on the decision in *New Beerbhoom Coal Company* v. *Bularam Mahata*[2], said that with a little effort on the part of the Court, the bargain between the parties could be made certain. This view found favour with Coutts Trotter, Chief Justice. In the words of the learned Chief Justice "if all that is left at large is something readily determinable on the materials afforded by the contract, then the Court is not precluded from interfering because something is left open.

1. (1927) I.L.R. 50 Mad. 595 : 52 M.L.J. 443 : A.I.R. 1927 Mad. 513.
2. (1880) I.L.R. 5 Cal. 932.

12. To a similar effect is the ratio in *H. V. Rajan* v. *C. N. Gopal*[1]. The relevant clause there, was that the lessees shall have the option of five years but subject only to such terms and conditions as may be mutually agreed upon. Hegde, J., as he then was, spoke for the Bench and said that the Courts will be reluctant to ignore that clause on the ground that it is vague unless on a reasonable construction no meaning can be attached to it. He went on to say :

"Even if we agree with the plaintiff's contention that the renewal provided is dependent on the agreement between the parties on other terms, on the basis of decided cases, we have no hesitation in reading that clause as providing for an agreement between the parties on terms reasonable. If the parties are at variance as to those terms then the Courts will step in".

He also relied upon the dicta of the Privy Council in *New Beerbhoom Coal Company* v. *Bularam Mahata*[2].

13. Finally, the Supreme Court in *D. T. Mangalmurti* v. *State of Bombay*[3], considered a covenant in a renewal clause reading "subject to such fair and equitable enhancement as lessor shall determine". Though *prima facie* the lessor had the option to determine the rent, yet the Supreme Court after accepting the principles laid down by the Privy Council as above and of our Full Bench in *Secretary of State* v. *Volkart Brothers*[4], held that the Court had jurisdiction in case of difference of opinion to fix what is fair and equitable rent. In that connection, the Supreme Court said:

"If the intention was to leave the enhancement to the subjective determination of the lessor, the clause would have more aptly said—'such enhancement as the lessor shall determine'. We consider that the words 'fair and equitable' must be given their due meaning and proper effect. The question then asked is—what meaning is to be given to the words 'such....as

1. A.I.R. 1961 Mys. 29.
2. (1880) I.L.R. 5 Cal. 932.
3. 1959 S.C.J. 760 : A.I.R. 1959 S.C. 639.
4. (1927) I.L.R. 50 Mad. 595 : 52 M.L.J. 443.

'the lessor shall determine'. It is indeed true that these words constitute an adjectival clause to the expression 'fair and equitable enhancement' but we consider that the meaning of the adjectival clause is merely this:

> the lessor must first determine what it considers to be fair and equitable enhancement; but if in fact it is not so, it is open to the lessee to ask the Court to determine what is fair and equitable enhancement. We do not think that on a proper construction of the clause, the intention was to oust the jurisdiction of the Court and make the determination of the enhancement by the lessor final and binding on the lessee".

It is, therefore, fairly clear that if a clause similar to the one provided in clause 3 of Exhibit A-1 is provided by the parties as the effective condition precedent for obtaining renewal, then it is but fair that such a clause ought not to be lightly brushed aside on the ground that the parties are incapable of working out the result therefrom. We could take notice of the deep fluctuations in rent and in the value of building and building materials as between 1959 and 1969. Owing to the just expectation of a rise in such rents or price or due to the normal economic fluctuations with which such matters are intricately mixed up the parties provided for a clause for the fixation of rent on the basis of the prevailing rent in the locality at the end of the first period. This covenant is the result of prudence and reason and obviously provided for after noticing the economics of living. *Ita scriptum est* is the first principle of interpretation of documents. But to this, a necessary corollary is always annexed with a rider compelling parties or Courts, if they are called upon to interpret an instrument, to bear in mind not only the script of the instrument, but also the *sententia*, that is the intention of the parties, as inhered in the instrument itself. If this principle is borne in mind, then it is easy for us to decide what is the legal content and effect of the renewal clause under consideration. That means that the parties should, in the first instance, examine the necessary data relating to the prevailing rent in the locality and on such hypothesis mutually agree upon a fair or just rent. If in spite of the availability of such material, the parties are unable to agree or violently differ in the matter of arriving at an agreed solution, then, it is clear from decided and very high authorities that Courts are not helpless to determine the rent on the basis of material produced by the parties and cut the Gordian knot. The arms of Court could be extended in such circumstances to solve the apparent difficulty or a created difficulty and determine matters. It is in this context that the learned City Civil Judge has so determined the fair, just and proper rent payable by Esso to Khivraj Chordia. The rate of rent of Rs. 2,000 per month as fixed by the Court below as the fair and reasonable rent payable by Esso to Khivraj Chordia to obtain a renewal of the lease in respect of the suit site has not even been challenged before us.

14. In the above circumstances, the suit for specific performance has been rightly decreed and the suit in ejectment dismissed.

15. The result is that both the appeals fail and they are dismissed, but in the peculiar circumstances of the case, there will be no order as to costs.

R.S. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:—*T. Ramaprasada Rao and S. Ratnavel Pandian, JJ.*

C. K. Krishnan .. *Appellant**

v.

C. K. Shanmugham and others .. *Respondents.*

Hindu Law—Property standing in the name of females—Separate property or family property—Presumption—Joint family or coparcenery property—Nature and incidents of.

The presumption which usually arises when a property stands in the name of a male member of a Hindu joint family, is not so easily available in cases where the properties stand in the name of a female member. In a joint family, if there is sufficient nucleus belonging to the said family and if that apparatus of a nucleus is in a position to yield surplus income which would enable the members of the joint family to purchase property in the name of one or the other of the members of the family, then the presumption is raised that such properties, though *prima facie* in the name of one of the members of the family, are validly to be held to be properties of the family and not of the members concerned. If a challenge is made that the particular person in whose name the property stands is its owner, then the onus is heavily on him to establish that he has purchased the property from and out of his own acquisition and without resort to, or without deriving any assistance from the joint family nucleus or its income. But on the other hand, if the property stands in the name of a female, no such *prima facie* presumption arises. If the challenge, however, by a member of the family is that the property standing in the name of a female member such as a member's wife or a sister of the family etc. should enure to the benefit of the family in general, then he has to necessarily bring home such hypothesis and data to the knowledge of the Court in an action initiated by him and establish, at least reasonably, that his contention is plausible and maintainable. If, on such data made available to the Court, the ostensible title of the female holder is likely to be tilted, then the female member, in whose name the property stands, is obliged to give contrary evidence to set at naught that inference which might be drawn by the Courts on the hypothesis produced by the challenging member of the family. [*Para.* 6.]

Where there are joint family properties other than those delineated in the plaint schedule, then such property also ought to be impressed with the character of joint family property under the well-known principle that joint family property is held in collective ownership by all members in a quasi-corporate capacity. Till a partition takes place, each member can proclaim such rights of ownership over the entire property and till such a division by metes and bounds takes place in a manner known to law such possession and enjoyment of one shall be deemed to be for the benefit of the rest of the members as well. [*Para.* 12]

Cases referred to:—

Nagayasami Naidu v. *Kochadai Naidu*, (1970) 1 M.L.J. 105 : 81 L.W. 436: I.L.R. (1969) 1 Mad. 459: A.I.R. 1969 Mad. 329 ; *Katama Natchiar* v. *Rajah of Sivaganga*, 9 M.I.A. 539; *State Bank of India* v. *Chamandi Ram*, (1969) 2 S.C.J. 825 : (1969) 2 S.C.C. 33 : (1969) 3 S.C.R. 681: A.I.R. 1969 S.C. 1330.

Appeal against the decree of the Court of the Subordinate Judge, Coimbatore in Original Suit No. 438 of 1967.

S. Ramalingam, for Appellant.

S. T. Seshadri and *A. Ramanathan*, for Respondents.

The Judgment of the Court was delivered by

Ramaprasada Rao, J.—The second defendant is the appellant in this appeal. Kuppanna Gounder had three sons—C. K. Krishnan, the eldest, C. K. Shanmugham, the second and C. K. Kandavel, the third and the youngest. His wife is one Rukkammal. The second son, C. K. Shanmugham, filed the present

*Appeal No. 869 of 1970. 11th December, 1974.

action impleading his mother Rukkammal as the first defendant, his elder brother G K. Krishnan as the second defendant and his younger brother G. K. Kandavel as the third defendant, for partition of the joint family properties into four shares and to allot one such share to the plaintiff. He also sought for an account as regards the income from items 3, 4 and 5 of the plaint schedule properties and for a direction as against the second defendant to pay the mesne profits from the date of the suit till delivery of possession. In the schedule to the plaint, he included seven items of properties, the first being the residential house bearing Door No. 21, Rangai Goundar Street, Coimbatore, the second, which was originally a house-site but now bearing Door No. 11/7 Ponnurangam Road, R. S. Puram, Coimbatore, the third, Palaniandavar Rice Mills situate in the family house No. 21, Rangai Goundar Street, the fourth and the fifth being Semiya Works, one run in the name of Ganesh Semiya Works, in the family house and the other, Jayanthi Semiya Works at No. 13/188, Thadagam Road, Coimbatore; the sixth item is an auto-rickshaw said to be in the possession of the second defendant and the last one is a bare item of cash of about Rs. 50,000 said to be with the second defendant, which is an accumulation of savings from the joint family income. The first defendant, the mother, filed her statement stating that the plaintiff omitted to bring into the action several other items of properties which are also to be divided amongst the sharers and she enumerated seven more items. The description of those items are as follows:

1. Rajendra Flour Mill with machineries in Uppara Street, Coimbatore.

(2). One auto-rickshaw MYD. 3172 standing in the name of the plaintiff, and a car MDU. 6969 standing in the name of the plaintiff, were disposed of recently. The auto-rickshaw was sold for Rs. 7,500 four months ago and the car was disposed of nine months ago for Rs. 11,500. The said cash of Rs. 19,000 is still with the plaintiff.

(3) Two chits each for Rs. 5,000 were taken in the name of the plaintiff and subscriptions were made from out of the income from the joint family property and the plaintiff bid at the auction four months age and received Rs. 7,500 to which the first defendant stood as surety. The plaintiff is having the said sum of Rs. 7,500.

(4) Rs. 1,000 worth shares (ten shares) in Ananda Kumar Mills, Saravanampatty standing in the name of the plaintiff for the last ten years.

(5) The life insurance policy taken in the name of the second defendant for Rs. 10,000 by the husband of the first defendant and the paid up amount of Rs. 2,500 was received by the second defendant. The premium was paid out of the income from the joint family property.

(6) The cash on hand with the plaintiff will be not less than Rs. 20,000 besides the cash referred to above.

(7) The cash with the second defendant will be more than Rs. 50,000.

2. The second defendant, who is the contesting defendant, would say that excepting for item 1, 2 and 3, the properties delineated by either the plaintiff or the first defendant are not joint family properties. In the main, his case is that though, at one time, Ganesh Semiya Works was carried on by him in the joint family house at No. 21, Rangai Goundar Street, he later on dissociated himself from the family under Exhibit B-1 dated 21st December, 1957 by executing a release deed in favour of the plaintiff, the first and the third defendants after receiving a cash consideration of Rs. 3,500 and that thereafter, he had nothing to do with the family. His case is that thereafter, he, with the assistance of the funds belonging to his wife, examined as D.W. 2, set up an independent Semiya Works in the name and style of Jayanthi Semiya Works at Thadagam road and the latter Semiya Works is the independent and separate property of his wife in which neither himself nor any other member of the joint family is, in any way, interested. In short, his case is that Ganesh Semiya Works was closed in or about 1957 when he left the family and his wife started Jayanthi Semiya Works in her own right and withou-

reference to the family or the funds of the family and that, therefore, Jayanthi Semiya Works at Thadagam road is not partible property. He would, no doubt, admit that there was an auto-rickshaw which belonged to the family and which was in his custody, but he would say that it had been sold and the sale proceeds spent away for the purposes of the family and therefore, he denied the obligation to bring it into the hotch-pot for the purpose of division amongst the members. He expressly denied that he ever had, at or about the time when the suit has been instituted, or at any time before, a sum of Rs. 50,000 in cash or any other amount over and above that, as alleged by the first defendant which was traceable to the savings he effected from and out of the income of the family properties. He would also allege that after the plaintiff issued the suit notice, Exhibit A-1, there was a panchayat in which all the disputes between the members of the joint family were settled and the panchayatdars, having entered on the reference, did pass an award which was to the satisfaction of every one concerned. According to the second defendant, the award of the panchayatdars was reduced to writing and signed by the parties and was kept with one of the panchayatdars and that he and the third defendant paid the plaintiff a sum of Rs. 500 each for the purposes of purchasing the stamp papers and that the plaintiff indeed purchased such stamp papers also, but, for reasons better known to him, has come to Court ignoring the said panchayat. He would refer to the proceedings before the panchayatdars obviously for the reason that in such a panchayat no one queried the interest of the second defendant's wife in the Jayanthi Semiya Works at Thadagam road and that in that context, this item, now claimed by the plaintiff as joint family property, is a development made with an ulterior purpose. In the result, he would say that the only joint family business in which all the parties are interested is the third item of the plaint schedule and the parties could only seek for their legitimate shares in accordance with the personal law over items 1, 2 and 3, and that items 4, 5 and 6 are not partible properties and item 7 is not in existence. The third defendant agreed with his mother and did not file an independent written statement. The plaintiff, after having had the benefit of the statements of his mother and the second defendant, filed a reply statement, denying his liability to bring in those properties which his mother alleged to be joint family properties, but maintained that items 1 to 7 are to be partitioned in accordance with the just shares of the parties. On these relevant pleadings, the following issues and additional issues were framed:

(1) Whether the plaintiff and the defendants are members of a joint family ?

(2) Whether items 4 and 6 are joint family property ?

(3) Whether the item 5 is the joint family property ?

(4) Whether the suit is bad for partial partition ?

(5) Whether item No. 7 is existing ?

(6) Whether the second defendant is manager of the family and is liable for account ?

(7) Whether the second defendant is liable to pay mesne profits from the date of the suit till delivery of possession ?

(8) Whether the court-fee paid is correct ?

(9) Whether the second defendant is liable for costs ?

(10) Whether the second defendant is entitled to compensatory costs from the plaintiff ? and

(11) To what relief is the plaintiff entitled ?

Additional Issues framed:—

(1) Whether the plaintiff is not accountable for the sale proceeds of the auto-rickshaw and car ?

(2) Whether the chit amount of Rs. 10,000 is not joint family property ?

(3) Whether the debts mentioned in para. 9 of the written statement of the second defendant are true ?

(4) Whether Rajendra Flour Mill is not the joint family property?

(5) Whether the alleged panchayat is true and binding?

3. The learned trial Judge, after considering the oral and documentary evidence, came to the conclusion that the plaintiff was entitled to a preliminary decree for partition of the suit items 1 to 5 into four equal shares and to an allotment of one such share to him and that the plaintiff was also entitled to a direction as against the second defendant for an accounting of the income from items 3 to 6 and that the plaintiff himself should render an account of the Rajendra Flour Mills which he found to be a joint family property. As regards the insurance policies, the shares, the chit amounts the car and the auto-rickshaw, mentioned by the first defendant as joint family properties, he would say that they were not available as on the date of the suit and so, he did not give a finding and left it at that. He also held that Jayanthi Semiya Works at Thadagam road should *inter alia* be treated as joint family property In the result, the second defendant's claim that the Jayanthi Semiya Works was an independent property of his wife was negatived and he was also asked to account for the income from items 3 to 6. It is as against this part of the judgment of the Court below that the present appeal has been filed by the second defendant. It would be convenient for us to deal with the present action with reference to individual items claimed by one or the other of the members of the joint family instead of consolidating the entire evidence in relation to such properties.

4. There is no dispute before us that items 1 to 3 in the plaint schedule are joint family properties. At one time, the second defendant took up the plea that as he left the family by executing a release deed under Exhibit B-1, he would not, in any way, be liable as a member of the joint family or as its manager. But, necessarily, this stand was slippery for the appellant, since under Exhibits B-2, B-3 and B-4, he has once again joined the family as is seen from the re-purchase of the share from the other members of the family pursuant to an agreement of reconveyance obtained by him under Exhibit B-2 which was a document contemporaneous with Exhibit B-1, the instrument of release executed by him on 21st December, 1957. Whatever might be the position which flowed from the alleged release of his rights, executed by and under Exhibit B-1, it is now common ground that the second defendant is a member of the family and is entitled to his one-fourth share in all the properties which belonged to the joint family and which are to be badged as joint family properties.

5. The question, therefore, is, what are the joint family properties available for division. We have already stated that as at present, there is no controversy amongst the parties regarding items 1 to 3 of the plaint schedule properties. The lower Court has found, and in our view rightly too, that the Rajendra Flour Mills which is now conducted by the plaintiff, has also to be brought into the hotch-pot and the plaintiff made liable to account for the income therefrom as it is not in dispute that the said flour Mills sprung from the nucleus of the joint family and was run by the plaintiff in his name, but, for the benefit of the family, and this finding of the Court below is not challenged before us. This is, therefore, one other item of joint family property which is admittedly partible.

6. The main controversy, however, revolves on the question whether Jayanthi Semiya Works at Thadagam road, which is admittedly in the name of the second defendant's wife, is the property of the joint family or not. A note of caution is always struck when Courts are obliged to deal with properties standing in the names of female members of a joint family. The presumption which usually arises when such a property stands in the name of a male member of the family, is not so easily available in cases where the properties stand in the name of a female member. In the joint family, if there is sufficient nucleus belonging to the said family and if the said apparatus of a nucleus is in a position to yield surplus income which would enable the members of the joint family to purchase properties in the name of one or the other of the

members of the family, then the presumption is raised that such properties, though *prima facie* in the name of one of the members of the family, are virtually to be held to be the properties of the family, and not of the member concerned. No doubt, if, in a given case, a challenge is made that the particular person in whose name the property stands is its owner, then the onus is heavily on him to establish that he has purchased the property from and out of his own acquisitions and without resort to, or without deriving any assistance from, the joint family nucleus or its income. But, on the other hand, if the property stands in the name of a female, no such *prima facie* presumption arises. If the challenge, however, by a member of the family is that the property standing in the name of a female member such as a member's wife or a sister of the family etc., should enure to the benefit of the family in general, then he has to necessarily bring home such hypothesis and data to the knowlege of the Court in an action initiated by him and establish, at least reasonably, that his contention is plausible and maintainable. If, on such data made available to the Court, the ostensible title of the female holder is likely to be tilted then the female, member, in whose name the property stands, is obliged to give contrary evidence to set at naught that inference which might be drawn by the Courts on the hypothesis produced by the challenging member of the family. The above proposition is stated by a Division Bench of this Court in *Nagayaswami Naidu* v. *Kochadai Naidu*[1], in a slightly different way thus :

> " There is an essential distinction as to the scope of the presumption in the case of acquisitions in the names of male members of a joint family and the female members of a joint family. In the case of male members of a joint family, there is presumption that if the joint family had sufficient ancestral nucleus, the properties standing or acquired in the name of junior members are joint family properties unless the presumption is rebutted by showing that the properties are the separate properties of the particular member or members in whose names the properties stand or were acquired. There is no such presumption in the case of properties standing in the name of female members. In the latter case, it is for the party who claims properties as joint family properties to specifically plead the particulars and details, in the pleadings and establish the same by adducing necessary evidence. If there is no pleading and, if, on the side of the plaintiff, there is no evidence, there is no need for detailed scrutiny of the case of female members or persons claiming through them as to the resources of the female members and as to how they acquired the properties in question. If the plaintiff on whom the burden lies adduces no evidence, no further question arises and the female member in whose name the property stands, must be held to be the beneficial owner of the property in question."

The learned Judges of the Division Bench made it clear that there should be a pleading and the challenging party, or the plaintiff in the concerned action, should also produce some evidence for the Court to scrutinise the title of the family member so as to ascertain whether the real title in the property is in such a female member or she is only a benamidar for the family.

7. It is in the light of such a proposition of law, we have to look into the data made available to the Court by the plaintiff in the action. In paragraph 5 of the plaint, the plaintiff specifically alleges that after differences and disputes arose between the second defendant on the one hand and the other members of the family on the other, the second defendant has been acting against the interests of the plaintiff and the other members and has shifted the Ganesh Semiya Works from the premises as Jayanthi Semiya Works in Thadagam road. He has purported to amalgamate both the business and is attempting to get the necessary licences in the name of his wife, to make it appear that the businesses were his wife's own, since the Semiya Works business has become more prosperous and yielding greater profits than the rice-mill trade.

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1. 81 L.W. 436 : I.L.R. (1969) 1 Mad. 459 : (1970) 1 M.L.J. 105 : A.I.R. 1969 Mad. 329.

After setting out in the pleadings his specific case regarding Jayanthi Semiya Works, he would state in his evidence that Ganesh Semiya Works was closed in 1957 and that Jayanthi Semiya Works was started in the name of the second defendant's wife and there is considerable nexus between these two businesses, which will lead to the inference that the latter Semiya Works, though ostensibly in the name of the second defendant's wife, should enure to the benefit of the family. As against this specific case pleaded by the challenging member of the family. the second defendant's wife has come forward with the story that she started Jayanthi Semiya Works with the assistance of a fund of Rs. 3,500 said to have been given to her under an unregistered document stated to have been executed by her father on 21st October, 1966. She claims that her father made a gift of this sum of Rs. 3,500 to her and she accepted the same and that it was with this capital or nucleus that she started Jayanthi Semiya Works. It is brought out in evidence that she started the business in her own name and she would state, as D.W. 2, that Exhibits B-54, B-55, B-56, B-57, B-58 and B-59 are all public documents such as rental receipts etc. or licences issued by the Municipality in the matter of the starting of the business, or the licence from the Electricity Department for issuing current to the Semiya Works and Municipal licences to carry on the business etc. On the foot of such evidence let in by the second defendant to counter-act the allegation made by the plaintiff that Jayanthi Semiya Works at Thadagam road is joint family property, the second defendant desired to sustain his case that the Jayanthi Semiya Works is the exclusive property of his wife.

8. That Ganesh Semiya Works was closed in or about 1957 and that it was in the management of the second defendant when it was being worked, is not in dispute. The second defendant, as D.W. 1, would admit that the machines used and utilised by the family for running Ganesh Semiya Works in the family house at No. 21, Rangai Gounder Street are the family properties. After having said that, he would plead ignorance as to what happened to the machinery thereafter. At a later stage in cross-examination, he had to admit that the machinery connected with Ganesh Semiya Works were given for repairs and he would say that he was not aware as to what happened to those machinery which he gave for repairs. Obviously, this prevaricating evidence of the second defendant leads to the inference that the machinery which were in his custody at a time when he was managing the joint family properties must be still with him as he has not satisfactorily accounted for such machinery admittedly given by him to a repairer. Now, the question is whether Jayanthi Semiya Works could be deemed to be impressed with the badge of joint family property. The plaintiff and the defendants other than the second defendant allege that Jayanthi Semiya Works is merely a reflection of Ganesh Semiya Works. That this is possible is seen from Exhibit A-17. This is a proceeding issued by the City Rationing Officer in charge, Coimbatore. That was at a time when the disputes started between the members of the family and the present action also had been initiated by the plaintiff. In this proceeding, dated 22nd April, 1968, the City Rationing Officer has stated that the second defendant transferred the properties of Ganesh Semiya Works to his wife's concern, by making an application requesting to club both the permits (permits for the issue of maida) in the name of Jayanthi Semiya Works absorbing the permit issued to Ganesh Semiya Works. He adds as follows : " I would like to make clear the position that was prevailing at the time where the individual standing permits of Ganesh Semiya Works and Jayanthi Semiya Works were clubbed into one and a consolidated permit was issued." The conduct of the second defendant in having sought for the consolidation of the permits for the issue of maida at a time when Jayanthi Semiya Works was set up at Thadagam road and when Ganesh Semiya Works was closed at Rangai Gounder Street, is a particular and telling situation, which supports the claim of the plaintiff and the members of the family other than the second defendant. When such pleadings and reasonable evidence were made available to the Court prompting it to infer that Jayanthi Semiya Works should be brought into

the hotch-pot as a joint family property, the onus has tilted on the shoulders of the second defendant's wife to establish that it was her property. The nature of the evidence let in by the second defendant's wife has already been touched upon by us. The father of the second defendant's wife has not been examined. As to why he was kept out from the box is not clear. His evidence was absolutely necessary to prove that he had the capacity to gift Rs. 3,500 to his daughter. Again, there is no proof that the second defendant's wife ever purchased machinery from any particular body or company or had it forged or fabricated through a known factory. In order to establish that it was she who has responsible for setting up the machinery at Thadagam road, reliance is placed on Exhibit B-60 by the ostensible owner. Exhibit B-60 is an order by the second defendant's wife to a company, by name Jothi Dayal Industries, Ramnagar, Coimbatore, asking them to fabricate one Semiya machine from the materials supplied by her and from the materials such as M. S. Plates, shafts, bolts etc., to be supplied by Jothi Dayal Industries. This order form itself presupposes that D.W. 2 was to supply materials herself for the fabrication of the machinery. But, whether Jothi Dayal Industries undertook the job and ever fabricated the machinery is in doubt for the reason that Exhibit B-60 was not furthered by other acceptable evidence in that direction. We are therefore left with this, that there was the machinery of Ganesh Semiya Works which was in the control of the second defendant. The second defendant does not explain as to how the machinery has gone out of the family. His explanation is that he gave it to a repairer and he is not aware as to what happened to it. This is not at all believable. Immediately thereafter, we find a similar Semiya Works, but in the name of Jayanthi Semiya Works, in the name of his wife which he started at Thadagam road. His wife is unable to explain as to where from she purchased the machinery or secured the necessary capital for running the firm. All these surrounding circumstances go against the self-serving statement of the second defendant and his wife that Jayanthi Semiya Works at Thadagam road is the absolute property of the second defendant's wife. The result, therefore, is that, we accept the finding of the Court below that Jayanthi Semiya Works should be treated as joint family property and is partible amongst its sharers.

8. We may, before passing to the other items, refer to the hesitant argument of the learned counsel for the appellant that Ganesh Semiya Works also is a self-acquired property of the second defendant. Reliance is placed upon certain entries made in the account books kept by the second defendant while he was in charge of the Ganesh Semiya Works. We have looked into the accounts and found that all such entries relied upon by the second defendant are interpolations and made obviously with the object of projecting an independent title in himself. After scrutiny of the said accounts, Mr. Ramalingam, counsel for the appellant, himself could not further his contention that Ganesh Semiya Works is the absolute property of the second defendant. As the parties are now agreed that Ganesh Semiya Works was closed in or about 1957 and thereafter it did not function, the further discussion on this question does not arise.

10. The sixth item is an auto-rickshaw which was admittedly in the name of the second defendant. The learned Judge found that it was in the custody of the second defendant when the Commissioner went into the family house for the purpose of taking an inventory. It was in those circumstances, the trial Court found that it is joint family property. The case of the second defendant who was examined as D.W. 1 is that he sold the auto-rickshaw for Rs. 3,500 apparently after the institution of the suit. It therefore follows that he has to account for it to the other members of the family. Even otherwise, the appellant has no case to answer on this aspect, because he has taken the stand that he purchased the auto-rickshaw from the income of the business, Ganesh Semiya Works which, at one time, he claimed as his own. In view of our finding, and as it is not even challenged before us that Ganesh Semiya Works should be deemed to be joint family property, the second defendant is accountable for the corpus which resulted from

the sale of the auto-rickshaw which is item No. 6 in the plaint schedule.

11. As regards item 7, the plaintiff himself did not let in any acceptable evidence that a large sum of Rs. 50,000 was remaining as surplus in the hands of the second defendant by way of savings from the income of the joint family properties. The finding of the Court below is that in the absence of any evidence of the existence of such an asset, no one could be made responsible for it. Item No.7, therefore, does not belong to the family and no one is responsible for accounting for the said sum.

12. We come to the next series of items which the first defendant, as the mother of the family, has categorised in her written statement as properties belonging to the joint family. Many of the items so detailed by the mother are said to be in the hands of the plaintiff. It is in this context, Mr. Ramanathan says that as the suit for partition was laid by him enumerating certain items as joint family properties, the description of some more items by another member of the joint family and the allegation that they should also be equally brought into the hotch-pot for the purpose of division cannot be granted in this action. This overlooks the fundamental principle that no coparcener or member of the joint family is entitled to any special interest in the coparcenary or joint family property, nor is he entitled to exclusive possession of any part of the property. The oft-quoted description as to the nature of such joint family property, made by the Privy Council in *Katama Natchiar* v. *Rajah of Sivaganga*[1], can be quoted with advantage : "There is community of interest and unity of possession between all the members of the family over such joint family or coparcenary property." In Mulla's Principles of Hindu Law (4th Edition), at page 266, the following passage occurs : "The essence of a coparcenary under the Mitakshara law is unity of ownership. The ownership of the coparcenary property is in the whole body of coparceners. According to the true notion of an undivided family governed by the Mitakshra law, no individual member of that family, whilst it remains undivided, can predicate, of the joint and undivided property, that he, that particular member, has a definite share, one-third or one-fourth .... It is only on a partition that he becomes entitled to a definite share. The most appropriate term to describe the interest of a coparcener in coparcenary property is 'undivided coparcenary interest'...... The rights of each coparcener until a partition takes place consist in a common possession and common enjoyment of the coparcenary property." In *State Bank of India* v. *Ghamandi Ram*[1], the Supreme Court had occasion to summarise the position, which is again extracted by the learned author thus : "The coparcenary property is held in collective ownership by all the coparceners in a quasi corporate capacity. The incidents of coparcenary are : first, the lineal male descendants of a person upto the third generation, acquire on birth ownership in the ancestral property of such person : secondly, that such descendants can at any time work out their rights by asking for partition ; thirdly, that till partition each member has got ownership extending over the entire property conjointly with the rest: fourthly, that as a result of such co-ownership the possession and enjoyment of the property is common......". It is therefore clear that if, in the ultimate analysis, in a suit for partition, it is found, either at the instance of the plaintiff who comes to Court or at the instance of other members of the coparcenary or joint family, there are joint family properties other than those delineated in the plaint schedule, then such properties also ought to be impressed with the character of joint family property under the well-known principle that joint family property is held in collective ownership by all the members in a quasi-corporate capacity. Till a partition takes place, each member can proclaim such rights of ownership over the entire property and till such a division by metes and bounds takes place in a manner known to law, such possession and enjoyment of one shall be deemed to be for the benefit of the rest of the members as well.

13. If this principle, therefore, has to be applied, then it follows that notwith-

1. (1861) 9 M.I.A. 539.

1. (1969) 2 S.C.J. 825 : (1969) 2 S.C.C. 33 : (1969) 3 S.C.R. 681 : A.I.R. 1969 S.C. 1330.

standing the non-dislosure, by the plaintiff, in the plaint, of the items of properties set forth by the mother who is a member of the family, in her written statement, and such a state of affairs and possession of joint family properties has come to light in the written statement of one of the parties to the action, even then, on the principle of community of interest and unity of possession, those properties also have to be brought into the hotch-pot so as to enable the members of the family to obtain their legitimate and just shares in them also.

14. In the light of the above accepted principles, it follows that all the items disclosed by the first defendant in her written statement have to be brought into the hotch-pot excepting the last two items, as we shall presently demonstrate, those items of property also ought to be badged with the impress of joint family property.

15. In so far as the Rajendra Flour Mills and the machineries appurtenant thereto in Uppara Street, Coimbatore, which is in the name of the plaintiff, is concerned, the lower Court itself has come to the conculsion that the plaintiff has to bring this item of property into the hotch-pot for division. There being no cross-appeal against it, we accept this finding. Nextly, the first defendant refers to two sub-items of properties under clause (2) of para. 4 of her statement, the first one, an auto-rickshaw MYD.3172 and the other, a car, MDU 6969. The learned Judge accepts that these are joint family properties. But, he further considered the story of the plaintiff which was to the effect that those two automobiles were sold away for Rs. 7,500 and Rs. 11,500 respectively and the sale proceeds were given away by the plaintiff to the second defendant who was the family manager. The plaintiff, examined as P. W. 1 would assert so: But, he has not produced a tittle of evidence to show that he has so given away the money to the second defendant. A member of the joint family cannot esape the liability to bring the partible property to the hotch-pot by a mere self-serving assertion either in the pleading or a development of such assertion in the witness-box. In the absence of any evidence that the plaintiff might have given away the said sum to the second defendant, whom he characterises as the manager of the joint family, we are unable to hold that the plaintiff is not accountable for the sale proceeds of these two sub-items of properties enumerated by the mother. We may at once state that it is not in dispute that these two items of properties were acquired by the plaintiff from and out of the joint family nucleus. What prompted, however, the learned Judge to agree with the case of the plaintiff is that during the panchayat held prior to the suit, these items were not brought to the notice of the panchayatdars. If really the panchayat ended in satisfying and whetting the appetites of all the parties concerned, there was no occasion at all for the parties to have come to Court and fight this litigation in such a lengthy and elaborate fashion. The so-called panchayat was obviously inchoate in scope and in aspect and possibly, that was the reason why the parties gave up the resultant decision arrived at by the panchayatdars. Exhibit B-6, which is a record of such panchayat proceedings has to be lightly brushed aside as one which cannot be considered to be a conclusion arrived at after taking into consideration the entire properties of the joint family and after considering every meticulous point that deserved such consideration at the hands of the panchayatdars. We do not agree with the conclusion of the trial Judge that Exhibit B-6 should be taken to be a final agreement arrived at between the parties after a full discussion. If the conclusion of the learned Judge is correct, then Exhibit B-6 should have been held to be a document which would not enable the plaintiff to come to Court at all. But, the learned Judge, for some purposes, ignored Exhibit B-6 and for other purposes took into consideration the recitals in Exhibit B-6 to arrive at the conclusion that Exhibit B-6 was acceptable. In our view, no such partial accetpance and partial disregard of an instrument, is possible. We are of the view that Exhibit B-6, in the peculiar circumstances of the case, cannot be deemed to be a document which could be relied upon for the adjustment, of the rights

and obligations of the parties before us. If, therefore, Exhibit B-6 has to be left out of consideration, it follows that the plaintiff is accountable for the sums of Rs. 7,500 and Rs. 11,500 being the sale proceeds of the auto-rickshaw and the car as they are to be treated as joint family properties.

16. The next item of joint family property referred to by the first defendant in her written statement is an amount realised by the plaintiff as a subscriber to certain chits. According to her, two chits were taken in the name of the plaintiff and the subscriptions were made from and out of the income of the joint family properties and the plaintiff bid at the auction four months prior to the suit and received Rs. 7,500 and that, therefore, the plaintiff has to account for the said sum of Rs. 7,500 There is no dispute that the contributions towards the chits were made from and out of the joint family income. It therefore follows that the sum of Rs. 7,500 being the amount which the plaintiff received as subscriber to those two chit funds, has to be brought into the common pool for the purposes of division. The learned Judge, once again, relied upon Exhibit B-6 and the bare *ipse dixit* of the plaintiff in order to accept his case that it is not joint family property. We have already touched upon the nature of Exhibit B-6. We are not accepting it. Having regard to the undisputed position in the instant case that the plaintiff made use of the joint family income to contribute towards the chits, he is accountable to the family to the extent of Rs.7,500 which amount he has admittedly received from the stake-holder.

17. The next item set forth by the mother in her written statement has reference to ten shares which the plaintiff held in Ananda Kumar Mills, Saravanampatty, worth about Rs. 1,000, for the past ten years. Here again, there is no dispute that the shares were purchased from and out of the joint family income. For the same reasoning as above, the plaintiff has to account for the value of such shares by bringing it into the partible list of properties.

18. The first defendant also refers to a life insurance policy which was taken in the name of the second defendant for Rs. 10,000 which the second defendant paid up and received a sum of Rs. 2,500 therefor. According to the first defendant, as the premium amounts were paid from and out of the joint family income, the amount received as the value of the paid-up policy of the second defendant from the insurance company has to be necessarily brought into the hotch-pot for division. There can be possibly no reasonable objection to this, as the premium amounts were, admittedly, paid from the income of the joint family and the second defendant has to account for the said sum of Rs. 2,500. The last two items set out by the mother in her written statement refer to two items of cash said to be with the plaintiff and the second defendant respectively. She alleges that the plaintiff has a sum not less than Rs. 20,000 and the second defendant would be having more than Rs. 50,000. Excepting for a bare allegation in the pleading, this was not furthered by any acceptable evidence in the course of the trial. The learned Judge, therefore, rightly, disallowed the claim of the first defendant that these two unproved assets of the joint family cannot be considered to be assets for being divided amongst the sharers of the family.

19. As regards the debts, we agree with the learned judge that it is unnecessary for us, at this stage, to go into the existence, genuineness or otherwise of such debts pleaded by the second defendant. If they are genuine and if the joint family is liable to bear such debts, then a provision shall be made in the final decree proceedings. We think that the learned Judge was right in holding that the question of truth or otherwise of such debts cannot be gone into at this stage.

20. The only surviving question, therefore, is whether one or the other of the parties is liable to account. In a broad sense, the plaintiff has to account for the income from Rajendra Flour Mills and also bring into the hotch-pot the entire corpus of that asset for being assessed and divided amongst the sharers; he has to bring to the pool the sums of Rs. 7,500 and Rs.11,500 being the sale proceeds of the auto-rickshaw M Y D

3172 and the Fiat Car M D U 6969 ; he has also to bring into the hotch-pot the sum of Rs. 7,500 which he has received in connection with the two chits already referred to ; he has also to bring into the common pool the ten shares held by him in the Ananda Kumar Mills, Saravanampatty. The second defendant similarly has to bring the sale proceeds of the auto-rickshaw mentioned as item 6 in the plaint schedule which has been proved to be Rs. 3,500 and also the sum of Rs. 2,500 being the paid up value of the insurance policy taken by him, the premia for which were paid from the joint family income.

21. The Commissioner's report, Exhibit C-1, belies the stand taken by the plaintiff that the second defendant, even after the institution of the suit, continued as manager of the family to be in charge of the rice mill. When the Commissioner went to take an inventory, it was the third defendant who opened the mill and showed it to him. Again, it was the plaintiff who produced the account books relating to the rice-mill when he was called upon to do so by the second defendant. The circumstances, under which the plaintiff came into possession of the account books, have not been explained, but nothing turns on it. But, having regard to the fact that the second defendant, on the date of the suit, was not in possession and control of the rice mill, which is admittedly a joint family property, he cannot be made liable as was done by the Court below. We, therefore, set aside that portion of the direction of the Court below which enjoins the second defendant to render an account in relation to the third item of the property. In so far as the first and second items are concerned, they are residential premises in which is situate the rice mill also. As, in our view, the second defendant was not in control or possession of any particular part or portion of items 1 to 3, to the prejudice of the other members of the family, it would be extremely unjust to direct the second defendant to account for the income from item 1 to 3 This portion of the judgment and decree of the Court below is also therefore set aside. In so far as items 1 to 3 are concerned, we have exonerated the second defendant from accounting as, in the light of the disclosures, made on the record before us, we are unable to pin-point as to who is the person who is responsible to account for the income from such properties to the other members of the family. Whilst, therefore, setting aside the direction, as against the second defendant, to render an account, we feel that it would be equitable to make an observation at this stage that if, in the final decree proceedings, it is found that anyone of the members or sharers was or is in possession and control of any portion of the joint family propertis (items 1 to 3) to the prejudice of the others then he shall be made accountable for such income derived by him as a result of such occupation or control to the prejudice of the others.

22. We do not, however, consider that the second defendant is liable to account for the mesne profits. There is no acceptable material before us to hold that he was in possession of items 1 and 2 at or about the time when the suit was filed and that such possession was to the prejudice of the other members of the family. The learned Judge gave a decree for mesne profits against the second defendant and made him so liable from the date of the suit. But, what was the property he had in his mind, the mesne profits of which the second defendant has to account for, is not clear. It has not been brought out by the learned counsel for the respondents before us that the said clause in the decree should stand because of a particular set of facts disclosed in the record. A joint family member would become accountable to the rest of the members only if it is established that he was in custody, possession and control of the assets of the joint family or the immovable properties of the joint family to the prejudice and exclusion of others. There has not been such clinching evidence in the instant case. We are therefore unable to agree that the second defendant is liable to account for mense profits as stated by by the learned Judge. The second defendant, however, is undoubtedly, liable to account for the income from the fifth item of the plaint schedule properties, namely, the Jayanthi Semiya Works, which we have held to be joint family

property and we direct the second defendant to so account for the corpus and the income of Jayanthi Semiya Works from the date of the suit. The plaintiff, in turn, has, no doubt, to account for the corpus and the income from the Rajendra Flour Mills.

23. We, therefore, hold that the properties which we have added on in this judgment as joint family properties, along with the properties already declared by the trial Court as such, shall constitute the partible joint family properties, in which the plaintiff would be entitled to a fourth share. There will be a preliminary decree for partition of the above joint family properties into four shares and to allot one such share to the plaintiff and the incidental directions already given as against the plaintiff and the second defendant shall follow suit. As the appellant has succeeded only in part, we direct that the parties shall bear their own costs in this appeal.

R.S. ——— *Appeal partly allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

PRESENT :—*K. Veeraswami, C.J. and S. Natarajan, J.*

Abraham Nadar and others .. *Petitioners**

v.

The Special Deputy Collector (Land Acquisition), Harbour Project, Tuticorin and others .. *Respondents.*

Land Acquisition Act (I of 1894), *sections* 4 (1), 5-*A and* 6—*Notification in* 1962—*Acquisition for public purpose—Objections filed—Declarations in* 1968 *and* 1969—*Notification challenged—Long lapse of time—Vagueness, lack of particulars and change in purpose of acquisition alleged —Writ of* mandamus—*Whether could be issued.*

A notification under section 4 (1) of the Land Acquisition Act was made in 1962. In answer thereto objections were raised under section 5-A : but no plea of vagueness of the public purpose was taken. The declaration under section 6 followed in 1968 and in January, 1969 ; a challenge to the validity of the notifications and the declaration was made in the objections filed only in 1973, after a long lapse of time. The delay was explained by stating that there was an alteration of the public purpose in the declaration which was different from the one in the notification under section 4 (1). But even after the declaration under section 6 there was a delay of more than 3½ years. That no plea was taken as to the vagueness of the public purpose in section 5-A objections stood unchallenged.

Held : Once the validity of the notification under section 4 (1) and also the declaration under section 6 remains unchallenged on any ground whatever, the rest of the matter is procedural under the Land Acquisition Act. If ultimately Government find that the land in question is not required for the public purpose it is always open to them at the appropriate stage to give up the acquisition under section 48 and, for that purpose, it is also open to the petitioner to apply to Government. [*Para.* 5.]

Cases referred to :—

Munshi Singh v. *Union of India*, (1973) 1 S.C.R. 973 : (1973) 2 S.C.C. 337 : A.I.R. 1973 S.C. 1150; *Aplatoon* v. *Lt. Governor, Delhi*, A.I.R. 1974 S.C. 2077.

W.P Nos. 2975/72, 3609 *of* 1973, 3610/73, 3611/73, 3612/73, 3613/73, 6665/73 *and* 2979/73.

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the respective affidavits filed therewith, the High Court will be pleased to issue a writ of *certiorari* calling for the records of the respondent (1) in G.O. Rt. 2827 II-1, dated 23rd December, 1968 read with Government Memo. No 49358/MILA II/72-2 Industries, dated 17th August, 1972 and quash the orders and declarations made thereon and published in the *Fort St. George Gazette*, dated 8th January, 1968 and 27th September, 1972 respectively.

* W.P. No. 2975 of 1972, 1796 of 1973, 2056 of 1973, 2059 of 1973, 2060 of 1973, 2072 of 1973, 2103 of 1973, 2979 of 1973, 2993 of 1973, 3001 of 1973, 3023 of 1973, 3024 of 1973, 3263 of 1973 3268 of 1973, 3275 of 1973, 3542 of 1973, 3545 of 1973, 3609 to 3613 of 1973, 6666 of 1973 and 112 and 145 of 1974 and W.A. Nos. 232 and 233 of 1973 and W.P. No. 2346 of 1973.

7th January, 1975.

V. Shanmugham and *Riaz Alikhan*, for Petitioners.

The Government Pleader, for Respondents.

The Judgment of the Court was delivered by

Veeraswami, CJ.—This batch of petitions under Article 226 of the Constitution and the writ appeals are directed against the notifications under section 4 (1) as well as the declarations under section 6 of the Land Acquisition Act, the first made in 1962 and the second in 1968 and January, 1969. The public purpose mentioned in section 4 (1) notifications was the development of Tuticorin Port or Tuticorin Harbour, establishment of industries, industrial estates, training centre and construction of residential quarters. But in the declarations under section 6 the purpose described was industrial development of Tuticorin area connected with Tuticorin Harbour Project. The land sought to be acquired extended to several thousands of acres. The short grounds on which the validity of the notifications as well as the declarations are challenged, are that the public purpose mentioned in the notifications under section 4 (1) was vague and lacked in particulars so as to enable the owners of lands to effectively file their objections to the purpose of acquisition under section 5-A, and that there was a change in the purpose of acquisition as mentioned in the declarations under section 6.

2. *Munshi Singh* v. *Union of India*[1], held that the whole object of section 5-A would be defeated, if the public purpose was stated vaguely and without any indication of the nature of the purpose for which the land was being or was intended to be acquired. In that case, all that was mentioned as public purpose in the notification under section 4 (1) was "for planned development of the area". The Supreme Court by an unanimous verdict held that the notification under section 4 (1) was vitiated on account of vagueness. The judgment was noticed by a larger Bench in *Aflatoon* v. *Lt. Governor, Delhi*[2]. The view in the earlier judgment was quoted apparently with approval, but with the observation that the question whether the purpose specified in a notification under section 4 was sufficient to enable an objection to be filed under section 5-A, would depend upon the facts and circumstances of each case. Actually, however, the second decision was rested not on the view to *Munshi Singh* v. *Union of India*[1] but on the ground of delay and laches or want of a plea at the earliest possible time. The Court pointed out that the plea as to the vagueness of public purpose in the notification under section 4 (1) was not raised in the writ petition, and that the writ petitions themselves were filed after a long delay. So, on the basis that the appellants before the Supreme Court were not vigilant and had failed to take the precise plea at the earlier stage, the appeals were dismissed.

3. In our opinion, the basis of *Aflatoon* v. *Lt. Governor, Delhi*[2] will apply to the present cases. The notification under section 4 (1) in the matters before us was made in 1962. In answer thereto, objections were relied under section 5-A : but no plea of vagueness of the public purpose was taken. The declaration under section 6 followed in 1968 and in January, 1969 : but the challenge to the validity of the notifications and the declarations was made in the objections filed only in 1973, after a long lapse of time. In justification of the delay, we are informed that, unlike in *Aflatoon* v. *Lt. Governor, Delhi*[2] in the instant cases there was an alteration of the public purpose in the declaration which was different from the one in the notifications under section 4 (1). This is hardly an explanation, because even after the declaration under section 6 there was a delay of more than 3 1/2 years. Also, the ground of the State that no plea was taken as to the vagueness of the public purpose in section 5-A objections stands unchallenged.

4. Applying *Aflatoon* v. *Lt. Governor, Delhi*[2], the petitions as well as the appeals are dismissed. No costs. For the purpose of assessing the fee as between counsel and party, we fix fee Rs. 200 in each case.

1. (1973) 1 S.C.R. 973 :(1973) 2 S.C.C. 337 : A.I.R. 1973 S.C. 1150.
2. A.I.R. 1974 S.C. 2077.

1. (1973) 1 S.C.R. 973: (1973) 2 S.C.C. 337: A.I.R. 1973 S.C. 1150.
2. A.I.R. 1974 S.C. 2077.

W.P.No. 2346 of 1973.

5. This too is like the other petitions and appeals which we have dismissed on the ground of delay and laches and for want of taking the precise plea. Nevertheless it is said that the extent of 39 acres 24 cents covered by the notification in this petition could not serve any purpose indicated in the section 4 (1) notification unless the immediately neighbouring lands of an extent of 440 acres belonging to the Central Government are also acquired. Counsel, for the purpose of meeting the objection on the ground of delay and want of a plea, is willing to accept the validity of the notification under section 4 (1) and the declaration under section 6. Even so, he says that, since the purpose mentioned in the notification under section 4 (1) and in the declaration under section 6 could not be implemented unless the neighbouring hands are acquired which apparently h as not been done so far, there is no longer any need for proceeding with the acquisition. The answer, in our opinion, is that, once the validity of the notification under section 4 (1) and also the declaration under section 6 remains unchallenged on any ground whatever, the rest of the matter is procedural under the Land Acquisition Act. If ultimately Government find that the land in question is not required for the public purpose it is always open to them at the appropriate stage to give up the acquisition under section 48 and, for that purpose, it is also open to the petitioner to apply to Government. But what is urged cannot furnish a ground for our interference, notwithstanding the objection based on the delay and laches on which we have held *Aflatoon* v. *Lt. Governor, De i*[1] was disposed of.

6. The writ petition too is dismissed. No costs. For the purpose of assessing the fee is between Counsel and party, we fix Rs. 200.

R.S. —— *Petitions and appeals dismissed.*

1. A.I.R. 1974 S.C. 2077.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(In Insolvency.)

PRESENT :—*S. Mohan, J.*

In the matter of S. A. Manicka Mudaliar and Company by its partners: 1 S. A. Manickaj Mudaliar and 2 M. Arunachalam .. *Insolvents.*

The Official Assignee, Madras .. *Applicant**

v.

S. Padmalakshmi .. *Respondent.*

Presidency Towns Insolvency Act (III of 1909), section 56—Insolvency—Debts due by father to daughter—Application within ten days thereafter for adjudication—Payment to daughter whether fraudulent preference.

Where in law, there is an obligation in the nature of a trust as between a father and his daughter, and the father is obliged to discharge that obligation and to make good a breach of trust it will be far-fetched to contend that he was paying the amount with a view to prefer. Nor again, could it be deemed to be fraudulent within the meaning of section 56 of the Presidency Towns Insolvency Act merely because the repayment was done to the daughter with the monies borrowed from creditors. [*Para.* 30.]

Cases referred to :—

Ex parte *Taylor* In re *Goldsmid,* 18 Q.B.D. 295 ; *Sharp* v. *Jackson,* (1899) A.C. 419 ; In re *Lake* Ex parte *Dyer,* (1901) 1 Q.B.D. 710 ; *Kathoom Bi* v. *Abdul Wahab Sahib,*(1939) 2 M.L.J. 208: 48 L.W. 783: 183 I.C. 289 : A.I.R. 1939 Mad. 313 ; *Labhu Ram* v. *Bhag Mal,* 54 I.A. 926 ; *Radhakishen* v. *Secretary of State,* A.I.R. 1932 Sind. 181 ; *Sithalinga* v. *Ardhanari Chetty,* (1939) 1 M.L.J. 745: 49 L.W. 644: 189 I.C. 170 : A.I.R. 1939 Mad. 645 ; Ex parte *Stubbins* : In re *Wilkinson,* (1881) 17 Ch.D. 58 ; Re *Cutts (a bankrupt),* ex parte *Bognor Mutual Building Society* v.

* Petition No. 69 of 1972.
Application No. 628 of 1974.
12*th March,* 1975.

Trustee in Bankruptcy, (1956) All E.R. 537 : (1956) 1 W.L.R. 728 (C.A.) ; *Crosby* v. *Crouch*, (1809) 2 East 256 ; *Bills* v. *Smith*, (1865) 34 L.J.Q.B. 68 ; Re *Ramsay*, Ex parte *Deacon*, (1913) 2 K.B. 80.

M. S. Venkatarama Iyer and *R. Sethuraman*, for Appellant.

The Court delivered the following

JUDGMENT.—This is an application for declaring the payment of Rs. 38,692-62 by the insolvents to the respondent, made on 17th July, 1972, fraudulent and void against the Official Assignee.

2. In this report dated 11th November, 1974, the Official Assignee has stated as follows :—

The insolvents (S. A. Manicka Mudaliar and M. Arunachalam), who were carrying on business in groundnut, were adjudicated on their own petition and the order of adjudication is dated 28th July, 1972. The insolvents filed a schedule of affairs. On an investigation into the accounts, it was found that the insolvents had, within three months prior to the date of filing the petition for adjudication, preferred the respondent and paid the debt due to her, *viz.*, Rs. 38,692-62 on 17th July, 1972, within 10 days prior to the filing of the petition for adjudication. These payments were made in discharge of the following borrowings of the insolvents from the respondent :

10—1—1969	Rs. 10,000
8—2—1969	Rs. 5,000
3—3—1969	Rs. 10,000
17—9—1969	Rs. 12,015

All these total up to Rs. 37,015, which, together with interest comes to Rs.38,692. It is submitted that this was a voluntary preference, there being no pressure of any sort from the respondent and, therefore, must be deemed to be fraudulent and void as against the Official Assignee. Hence, this petition.

3. In the counter statement of the respondent, it is stated that she was born on 24th April, 1952. There were moneys belonging to her, which were invested in mortgages, etc. While she was a minor, her father had taken and utilised the money belonging to her. Thus, he had committed breach of his duty, which he owed to her as his ward, and made it appear as if it was a loan given to him. At the time of marriage on 14th September, 1969, she was given a dowry of Rs. 10,008, and notwithstanding the marriage, she continued to live with her father. Her husband died on 10th October, 1971, leaving behind the respondent and a female child, Renuka, and at that time, her father was in financial difficulties. The mother and brother of the respondent took the father to task for having improperly utilised the moneys, and, therefore, he, in reparation, paid to her under insistence, Rs. 38,692.62 on 17th July, 1972. What her father had done was a clear breach of trust, since, her moneys in his hands were held by him in trust. If that be so, there was no question of any debt. It is relevant to submit that her father had paid within two months prior to the date of insolvency, a sum of Rs. 1,45,000 to several unsecured creditors. Therefore, even assuming that to be a debt, the payments were in the course of the usual business and it cannot be called fraudulent preference of one creditor to another. It is only because the father realised the gravity of the breach committed to her, more so, by reason of the insistence of the mother and the brother, the money was paid. Therefore, it is not correct to state that there was no pressure. Hence, the petition is liable to dismissed.

4. In his further report, dated 23rd December, 1974, the Official Assignee states that the respondent became a major on 24th April, 1970, and afterwards the insolvent-father ceased to be a guardian. No efforts were made either by the respondent's husband or by the respondent herself after her marriage and after she attained majority to get back the moneys from her father. It is, therefore, clear that the respondent had acquiesced in the loan taken by her father. From the standpoint of the estate, the money that was lent by the respondent was a mere loan and could be treated only as such. In any event, there appears to be no breach of trust made by the insolvent, when he took the loan from the respondent.

5. Evidence was tendered on behalf of the Official Assignee through P.W. 1, the Sub-Accountant, in his office, through whom the various amounts lent to the insolvents were marked as Exhibits P-1 and P-2. In cross-examination, an extract was put to the witness to show that a sum of Rs. 1,45,000 was paid to the various creditors and he admitted that all those entries were correct.

6. The respondent was examined as R.W. 1. She speaks to the fact of her marriage and the dowry given to her at the time of the marriage and also the unauthorised taking away of the money belonging to her. In cross-examination, as to how she got the money, she states that as and when there were auspicious functions like Ear-boring ceremony, Cradle ceremony, etc., she was given presents, which were handed over to her mother, who lent those amounts on interest and all the moneys were kept by the mother, with a view to purchase a house property for her. Asked as to the circumstances under which, she was paid money on 17th July, 1972, she deposes that her uncle, Kannappa Mudaliar and her aunt, came and demanded money from her father, which they had lent to him, and her mother, fearing that her father would use the money belonging to the respondent, immediately, counted the amount which was kept in the almirah and it was found that there was a deficit and the father was questioned. He admitted having taken the money. But, he would state that he had only invested the same in the business and he would repay it and accordingly, it was repaid.

7. R.W. 2 is the mother of the respondent. She adds in her testimony, after narrating the circumstances under which the money came to be paid, that it was only after a quarrel that the daughter having lost her husband, had some moneys to her credit, which was reserved for purchase of a house property, and that the husband had improperly taken away that money.

8. In cross-examination, she states that no accounts were maintained for the lending of moneys of the daughter and the huge amount was kept in the almirah and not in the bank, since it was intended for the purchase of a house for the daughter.

9. In this state of pleadings and evidence, Mr. M. S. Venkatarama Iyer, learned counsel for the respondent raises the following submissions : (1) The relationship being fiduciary in character, there is no question of any debt, and consequently, relationship between the insolvent and the respondent cannot be termed as that of a debtor and a creditor. In support of this decision, he cites Ex parte *Taylor In re Goldsmid*[1], *Sharp* v. *Jackson*[2], In re, *Lake* Ex parte *Dyer*[3], and the passages occurring in Halsbury's Laws of England, Fourth Edition, Volume 3, page 498, para. 911 and page 501, para. 916.

(2) This is a case in which the guardian lends to himself and where he appropriates the money belonging to the minor, it would amount to a breach of trust. In support of this submission, he relies on the decision in *Kathoom Bi* v. *Abdul Wahab Sahib*[4], *Labhu Ram* v. *Bhag Mal*[5] and *Radhakishen* v. *Secretary of State*[6].

(3) Where a person discharges an obligation in the nature of a trust, it is not with a view to prefer, and therefore, section 56 of the Presidency Towns Insolvency Act, cannot apply.

10. The learned Official Assignee submits as under :

(1) This is a case of a fraudulent preference and all the requisite conditions of section 56 are satisfied, and the *bona fides* of the respondent is immaterial. The fraudulent nature is evident from the list of assets wherein, under Schedule A, it is seen that all the debts were contracted in the year 1972. A perusal of that will make it clear that none of the creditors was paid while only relations were preferred for payment out. (2) There is no question of trust here, since there is no vesting of the property and none of the ingredients required under section 3 of the Trusts Act is present in this case, and consequently, the relationship is only of a debtor and creditor. In support of these two submissions, he relies on the

1. 18 Q.B.D. 215.
2. (1819) Appeal Cases 419.
3. (1901) 1 Q.B.D. 710.
4. (1939) 2 M.L.J. 208 : A.I.R. 1939 Mad. 713.
5. (1920) 54 I.A. 326.
6. A.I.R. 1972 Sind. 181.

ruling in *Sithalinga* v. *Ardhanari Chetty*[1], and also the passage, occurring in 'Williams' on Bankruptcy, Eighteenth Edition (1968), page 390.

11. I will now proceed to consider the merits of these respective submissions.

12. It is important to ascertain the nature of relationship because that will have a great bearing in deciding whether section 56 of the Presidency Towns Insolvency Act is applicable or not. That section reads as follows :

> "(1) Every transfer of property, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, with a view of giving that creditor a preference over the other creditors, shall if such person is adjudged insolvent on a petition, presented within three months after the date thereof, be deemed fraudulent and void as against the official assignee.
>
> (2) This section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the insolvent".

13. According to Mr. M.S. Venkatarama Iyer, the relationship is only that of a trustee and a co-trustee.

14. Lord Esher, M.R., held in Ex parte *Taylor*—In re, *Goldsmid*[2]:

> "With regard to the payment of the 3000 l cheque, the relation of debtor and creditor did exist between the bankrupt and Taylor. The bankrupt was in a position in which exposure would have, at least, been infamy to him, and it was very likely to lead him into extreme danger. He was actually threatened with a criminal prosecution before a Magistrate. Can we, under these circumstances, say that, when he made the payment, he made it with a view of preferring Taylor, rather than with the sole view of getting rid of the exposure with which he was threatened, and which would have been ruin to him in character as well as in money ? So far from differing from the conclusion of Cave, J., I think the bankrupt cared no more for Taylor than for any other creditor, but that he acted solely with the view of saving himself from exposure, infamy, and danger. I do not think there was any fraudulent preference.
>
> With regard to the other ground, the execution of the deed of the 23rd of March, the bankrupt had been guilty of a gross, and perhaps a fraudulent, breach of trust, and an application was made to him by Taylor, his co-trustee, to replace the trust money which had been lost. I do not say that threats were made use of, but great pressure was put on him. The relation of debtor and creditor did not exist between the parties. The relation was only that of trustee and co-trustee, honest trustee and defaulting trustee".

1. (1939) 1 M.L.J. 745 : 49 L.W. 644 : A.I.R. 1939 Mad. 645.
2. 18 Q.B.D. 295 at p. 300.

Again Lindley, L.J., held at page 301:

> "A *cestui que* trust is not a creditor of his trustee, nor is a trustee a creditor of his co-trustee. In neither case do the parties stand in the relation of debtor and creditor".

If this be the correct position, Mr. M. S. Venkatarama Iyer is right in his submission that the payment of the moneys to the respondent was not with a view to prefer.

15. The same line of reasoning was taken in Ex parte *Stubbins*—In re, *Wilkinson*[1], wherein it was held :

> "If a debtor on the eve of bankruptcy voluntarily makes good trust money which he has misapplied, the payment cannot be set aside as a fraudulent preference of the trust estate".

16. The following remarks of Rigby, L.J., occurring in In re, *Lake* ex parte *Dyer*[2], are also apposite.

> "How is a trustee a debtor ? Can he be sued at common law ? I do not see how he can be a "debtor", for the money he is fraudulently dealing with is, at law, his own money. No doubt he can be called upon to *replace* the money, but that must be

1. (1881) 17 Ch. D. 58.
2. (1901) 1 Q.B. 710 at p. 715.

by a suit in equity, not at law. Notwithstanding the high authority of the statement that has been referred to, I confess I do not understand it".

17. In the leading case of the House of Lords in *Sharp* v. *Jackson*[1], Earl of Halsbury L.C., referred to Ex parte *Taylor*[2], and ultimately held at page 426 as follows:—

"My Lords, it becomes unnecessary to raise other questions which have been disposed of before. It has been suggested that there was a proposition which could be maintained, as to which I confess I entertain grave doubts whether any decision goes to that extent, namely, that the relation between a *cestui que* trust and a trustee who has misappropriated the trust fund is not that of debtor and creditor. That it may be something more than that is true, but that it is that of debtor and creditor I can entertain no doubt. As that question has been mooted and brought before your Lordships' House as one question for decision here, I certainly have no hesitation in saying that in my opinion no such proposition can properly be maintained, and that although there are other and peculiar elements in the relation between a *cestui que* trust and a trustee, undoubtedly the relation of debtor and creditor can and does exist".

The other four learned Law Lords did not refer to this.

18. The following passage occurring in Halsbury's Laws of England, Fourth Edition (Volume 3) at page 498 (Para. 911) may be usefully referred to:

911. *Act done must be in favour of creditor or surety.*—For a transaction to constitute a fraudulent preference, the act must have been done in favour of a creditor, or a surety or guarantor for the debt due to that creditor and not in favour of any other person. Where, therefore, an act is done by a debtor with a view of benefiting himself, and a creditor or surety thereby obtains a benefit not shared by the debtor's other creditors, then, even though all the other elements of fraudulent preference are present, the transaction cannot be set aside on the ground that the creditoı or surety in fact derives an advantage.

Where a defaulting and insolvent trustee replaces money or property forming part of the trust estates which he has abstracted or taken, this does not amount to a payment or transfer to a creditor within this provision of the bankruptcy law."

"916. *Other circumstances negativing intention to prefer.*—It is not necessary to prove pressure, if there are other circumstances which suffice to rebut the presumption of fraudulent intention, and to suggest that the act complained of was not done with the view to prefer.

....that he desired to make reparation for a past wrong, as by restoring trust money which he had misappropriated."

Re *Wilkinson*, ex parte *Stubbins*[1], Re *Goldsmid*, ex parte *Taylor*[2], Re *Hutchinson*, ex parte *Ball*[3], *Sharp* v. *Jackson*[4], Re *Lake*, ex parte *Dyer*[5], *Cf. Radcliffe* v. *Abbey Road and St. John's Wood Permanent Building Society*[6], Re *Eric Holmes (Property) Ltd.*[7].

Again paragraph 917 at page 502 states:

"917. *Circumstances Inadequate to Negative Intention to Prefer.*—In order to negative an intention to prefer, it is not sufficient to prove that the debtor was moved by a mere sense of honour, *Sharp* v. *Jackson*[4], *Cutts (a bankrupt)*, ex parte *Bognor Mutual Building Society* v. *Trustee in Bankruptcy*[8], or a sense of duty or of moral obligation, or that he acted from motives of kindness or of gratitude." *Crosby* v. *Crouch*[9], *Bills* v. *Smith*[10], Re *Ramsay*, ex parte *Deacon*[11].

1. (1899) A.C. 419 at p. 422.
2. 18 Q.B.D. 295.

1. (1881) 17 Ch.D. 58.
2. (1886) 18 Q.B.D. 295.
3. (1887) 35 W.R. 264.
4. (1889) A.C. 419 (H.L.).
5. (1901) 1 K.B. 710.
6. (1918) 87 L.J.Ch. 557.
7. (1965) Ch. 1052 : (1965) 2 All E.R. 33.
8. (1956) All E.R. 537 : (1956) 1 W.L.R. 728 (C.A.)
9. (1809) 2 East. 256.
10. (1865) 34 L.J.Q.B. 68.
11. (1913) 2 K.B. 80.

19. On this basis, it is contended by the learned counsel for the respondent, Mr. M. S. Venkatarama Iyer, that the following passage occurring in 'The Law of Insolvency in India' by Mulla, Second Edition, (1958) at page 627 is wrong, since the actual decision of the House of Lords does not hold so:

> "The relation of a trustee who had misappropriated a trust fund and his *cestui que* trust is that of debtor and creditor. "Although there are other and peculiar elements in the relation between a *cestui que* trust and trustee, undoubtedly the relation of debtor and creditor can and does exist".

20. It is the argument of the learned Official Assignee that Ex parte *Taylor*, In re *Goldsmid*[1], is not the correct law and it has actually been overruled by the House of Lords, as seen from the observations made in *Sharp* v. *Jackson*[2], (which I have extracted above).

In re *Lake* ex parte *Dyer*[3], need not be considered at length since the remarks of Rigby, L.J. came to be made in answer to the argument of the counsel, and that was not the actual decision in that case.

21. I am unable to agree with the learned Official Assignee that Ex parte *Taylor*. In re *Goldsmid*[1], has been overruled by the House of Lords. To my mind it appears that the observations of Earl of Halsbury, L.C. at page 426 were only by way of *obiter*, and this perhaps led Rigby, L.J., to make those remarks in In re *Lake* ex parte *Dyer*[3].

22. No doubt Williams on Bankruptcy (Eighteenth Edition (1968)) at page 390 states :

> "Section 92 of the 1869 Act, and section 4 of the 1883 Act, applied to transactions between a debtor and persons who were in the strict sense his creditors. Thus, a person who had entrusted a bankrupt with money for a specific purpose was not a creditor within the section, and a defaulting trustee was a "debtor" neither of his *cestui que trust*, nor of his co-trustee". But this was disapproved by Lord Halsbury, L.C. in *Sharp* v. *Jackson*[1]".

But, I do not think that is the correct appreciation of the legal position. On this basis, the passage in "The Law of Insolvency in India" by Mulla, at page 627 (extracted above) must be held to be not reflecting the correct position.

23. The decision in Ex parte *Stubbins* In re *Wilkinson*[2], also lends support to the conclusion that if there has been an entrustment and if there is a relationship of a trustee and co-trustee, the discharge of that obligation by the trustee cannot amount to a fraudulent preference.

24. This conclusion alone is not sufficient to dispose of the case, since there remains the other question whether such relationship of a trustee and co-trustee does exist here. It is, in this connection, that the decision in *Kathoon Bi* v. *Abdul Wahab Sahib*[3]:

> "On their own showing respondents 1 to 3 were the guardians of the appellant and the minor's property being in their hands, they must account in full.
>
> ....1 to 3 We hold that respondents were in the position of trustees and are liable to account to the appellant for her half share in the profits out of the business".

becomes very relevant.

25. Likewise in *Labhu Ram* v. *Bhag Mal*[4], it was held:

> "The relationship between a guardian and his ward is very similar to the relationship existing between a trustee and his beneficiary.
>
> A guardian stands in a fiduciary relation towards his ward and is not allowed make any profit out of *his office*".

26. However, the learned Official Assignee would try to distinguish these

1. 18 Q.B.D. 295.
2. (1899) A.C. 419 at p. 426.
3. (1901) 1 Q.B.D. 710.

1. (1899) A.C. 419.
2. 17 Ch.D. 58.
3. (1939) 2 M.L.J. 208 at p. 213: A.I.R. 1939 Mad. 313.
4. (1920) 54 I. A. 926.

two cases by stating that the guardian cannot in any sense be called a trustee within the meaning of section 3 of the Indian Trusts Act, and merely because the relationship is a fiduciary one, it does not mean that there is a trust. He seeks to support his submission on the basis of the decision in *Sithalinga* v. *Ardhanari Chetty*[1], which has held thus:

> "The conclusion seems to be therefore irresistible that a guardian although he occupies a fiduciary position is held to be debarred from acquiring immovable property on behalf of his ward. The only standard by which he has to be judged is that of a prudent man who is acting carefully with his own money. If a guardian is found to have acted according to this standard he must be held to have done all that was required of him".

27. It may be correct to state that the 'trust' as contemplated under section 3 of the Indian Trusts Act, does not arise in this case. But, it has to be remembered that there are certain obligations in the nature of a trust as dealt with under Chapter 9 and this will undoubtedly be a case wherein there is an obligation in the nature of a 'trust' and the argument of the learned Official Assignee overlooks this important aspect. If this be the position, the decision in *Sithalinga* v. *Ardhanari Chetty*[1], does not lend support to the contention of the learned Official Assignee.

28. I am unable to agree with the learned Official Assignee when he states that there was actually no entrustment to the father, as seen from the evidence of R. Ws. 1 and 2 and in so far as it is admitted that the father has stealthily removed the amount belonging to the daughter, the father is none other than the "common thief". This argument ignores the position that the father is the natural guardian and it is in the evidence of R.W. 2 that he was taken to task for having improperly taken away the money belonging to the daughter, which was kept without investment in order to purchase a house for the daughter.

29. I am equally unable to accept the argument of the learned Official Assignee that there was no pressure on the father to pay this amount and the Court should not base its conclusion on sympathies, merely because the respondent is a young widow, barely having had only about 2 years of matrimonial bliss, that too with a daughter to look after.

30. Sympathetic considerations may prevail with the Court where it is a matter of discretion. But, here it is not on sympathies, I decide. In law, there is an obligation in the nature of a trust, where the father is obliged to discharge that obligation and to make good the breach of trust, it will be far-fetched to contend that he was paying the amount with a view to prefer. It is not the material pressure alone that matters. The evidence of both R.Ws. 1 and 2 points out that the father was taken to task and the quarrels became a daily feature on account of the taking away of the money by the father, which admittedly belonged to the daughter. Only with a view to clear his conscience and in reparation of the injury done to the daughter, whose cup of sorrow was already full at the loss of her husband, the father made good the payment. Under these circumstances, to contend that there was no pressure, is something which I cannot appreciate. Nor again, could it be deemed to be fraudulent within the meaning of section 56 merely because the repayment was done to the daughter with the moneys borrowed from creditors. That only shows that he was anxious to shield himself from the accusation that he was an evil father, adding to the woes of a bereaved daughter. If this be the position, the fact that Rs. 10,008 was paid as dowry to the daughter at the time of marriage and after the marriage the father had no right of guardianship does not, in any way, affect my decision. The reason I hold so is that it is in the evidence of R.W. 1 that even after the marriage, the daughter continued to live with father.

1. (1939) 1 M.L.J. 745 : 49 L.W. 644 : A.I.R. 1939 Mad. 313.

31. Thus, on careful consideration of all the above, I come to the conclusion that this application is liable to be dismissed and it is accordingly dismissed. There will be no order as to costs.

S.J. —— *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Ratnavel Pandian, J.*

T. K. S. M. Kalyanasundaram *Petitioner**

v.

Kalyani Ammal and another *Respondents.*

Criminal Procedure Code (V of 1898), section 133—Nuisance—Existence for a long period—No urgency existing—Remedy of aggrieved party.

No action can be taken under section 133 of the Criminal Procedure Code where the obstruction or the nuisance has been in existence for a long period and the only remedy open to the aggrieved party is to move the civil Court. Section 133, Criminal Procedure Code, is attracted only in cases of emergency and imminent danger to the health or physical comfort of the community. [*Para.* 4.]

Cases referred to :—

Asharfi Lal v. *The State,* (1965) 1 Crl.L.J. 535 : (1964) All.W.R. 244 : (1964) All.L.J. 629 : A.I.R. 1965 All. 215 ; *Murlidhar Bhila Patil* v. *Onkar Vyankat Patil,* A.I.R. 1961 Bom. 263.

Petition under sections 435 and 439 of the Code Criminal Procedure, 1898, praying the High Court to revise the Order of the of Court of the Executive I Class Magistrate, Karaikal dated 2nd July, 1973 and passed in M.C. No. 18 of 1971.

A. A. Selvam, for Petitioner.

N. Natarajan and Public Prosecutor for Pondicherry, for Respondents.

The Court made the following

ORDER.—This revision petition is preferred against the orders of the First Class Magistrate (Executive), Karaikal, in M.C. No. 18 of 1971 on his file giving certain directions to the Petitioner herein (respondent in M.C. No. 18 of 1971).

2. M.C. No. 18 of 1971 was filed by the first respondent herein under section 133, Criminal Procedure Code, in order to prohibit the working of the petitioner's industry in his rice mill situate in East Street, Neravy, a residential area, on the ground that the conduct of the said trade in the premises is injurious to the health and the physical comfort of the residents of that locality. The trade carried on by the petitioner is processing and boiling of paddy after it is soaked for softness in cisterns and the spreading of the boiled paddy on the open yard inside the mill premises for drying. The first respondent alleged nuisance by the foul smell emanting from the soaking cisterns, stagnation of water drained from these cisterns and the fly ash disseminated from the smoke belched out of the chimney while boiling of paddy with the use of husk as fuel. The Magistrate originally passed a conditional order under section 133 (1), Criminal Procedure Code, to the effect that the petitioner should desist from soaking and softening paddy till he modified the cisterns so as to obviate foul smell emanating therefrom and should also desist from using husk in the boiling of paddy till necessary modifications are made to prevent fly ash from being emanated all round. That conditional order was later made absolute. The petitioner filed Cr.R.C. No. 117 of 1972 on the file of this High Court and this Court, by order dated 5th January, 1973, set aside the said order and remanded the matter to the Magistrate for disposal afresh after making a local inspection and after examining public health authorities and the Chief Medical Officer and after giving an opportunity to both the parties to lead additional evidence. It is seen from the order of the learned Magistrate that he made a local inspection of the industrial establishment after due notice to the parties and in the presence of the learned counsel on 14th May, 1973. He also examined one Dr. Benedict, the ex-Chief Medical Officer, Karaikal. His report dated 8th May, 1969 is marked as Exhibit C-1.

* Crl.R.C. No. 743 of 1973 (P)
Crl.R.P. No. 732 of 1973. 14th February, 1975.

The learned Magistrate also considered the medical report of Dr. Carounanidhy the then Chief Medical Officer, who was also cross-examined by both parties with reference to his report dated 7th June, 1973, which has been marked as Exhibit C-2. The learned Magistrate also examined Dr. John Thomas whose report dated 30th April, 1971 had been adverted to by the previous Magistrate and that has been marked as Exhibit C-3. On a consideration of the evidence given by all the three Medical Officers, the learned Magistrate found that there was obnoxious smell emanating from the cisterns where the paddy is soaked, that the fly ash and smoke being belched out of chimney of the mill is deposited on the terrace of the first respondent herein, that the water from the cisterns of the soaked paddy is being let out by the open channels and allowed within the compound of the mill. According to the doctors, there is inconvenience caused by the mill in its vicinity and there is nuisance as a result of the soaking smell of the soaked paddy in the cisterns and as a result of the fly ash being carried by the blowing wind to the roofs around the mill and in particular to the terrace of the first respondent herein. The Magistrate also satisfied himself about the facts on his personal inspection of the mill. According to two doctors, the particles of the fly ash and the foul smell emanating from the soaking tubs cause a nuisance and are certainly a source of inconvenience to human beings. Two of the doctors opined that the ashes and dust might cause injury to public health and they proposed some remedial measures.

3. On a consideration of all the above circumstances and on his own personal satisfaction, the learned Magistrate ordered that the water in the soaking cisterns of the petitioner's mill be emptied and renewed every 24 hours, that the water let out of the cisterns be carried away by pipes to the nearby Thirumalaiarasanar river carrying backwaters and that any other alternative type of fuel be used for the oven instead of husk. The petitioner was directed to comply with the above orders within a period of 30 days, failing which the Court would prohibit the working of the mill, as, in its opinion, it had resulted in injury to health and physical comfort of the residents of the locality. It is as against these directions, the petitioner has filed the present revision petition.

4. Learned counsel appearing for the petitioner has strenuously urged that section 133, Criminal Procedure Code, is not intended to be employed to avoid the necessity of filing a civil suit in regard to the alleged nuisance which has been in existence for a long period. Section 133, Criminal Procedure Code, provides a speedy and summary remedy only in cases of urgency where danger to public interest or public health is involved. In all other cases, the party should be referred only to the remedy under the ordinary law. It is seen from the order of the learned Magistrate that the husband of Kalyani Ammal, the first respondent herein, had already filed a petition in the Court of the Executive First Class Magistrate, Karaikal, against the petitioner herein, which was finally dismissed as there was no justification for taking action under this section. Thus, it can be seen that this alleged nuisance would have been in existence for a long period. The circumstances and the evidence in this case do not prove that an urgency exists warranting the taking of action under this section. No action can be taken under this section where the obstruction or nuisance has been in existence for a long period and the only remedy open to the aggrieved party is to move the civil Court. For this proposition, learned counsel for the petitioner relied on *Asharfi Lal* v. *The State*[1], wherein it has been held that the proceedings under section 133 should be taken in cases of emergency where the public shall be put to great inconvenience and shall suffer an irreparable injury if the encroachment or nuisance is not removed at once by adopting the summary procedure contained in Chapter X, Criminal Procedure Code, and therefore, ordinarily no action under section 133 can be taken where the obstruction or nuisance has been in existence for a long

1. 1964 All. W.R. 244 : 1964 All. L.J. 629 : (1965) 1 Crl. L.J. 535 : A.I.R. 1965 All. 215.

period. It is further observed that there is no legal bar to seeking remedy under section 133 where there exists a genuine emergency to have the encroachment or nuisance removed. Such an action can be taken even though the encroachment or nuisance has been in existence for a reasonably long period. But, if the obstruction has been in existence for a long period, without any change in circumstances, the removal of such obstruction cannot be said to be urgent and the remedy must be sought in a civil Court. The learned Counsel also relied on *Murlidhar Bhila Patil* v. *Onkar Vynkat Patil*[1], where it has been held that an order under this section would be justified only if the conduct of the trade is injurious to the health or physical comforts of the community, and that these words necessarily mean that the conduct of the trade is injurious *in praesenti* to the health or physical comfort of the community. In that case also, it has been held that unless there is such imminent danger to the health or physical comfort of the community in that locality or the conduct of the trade or occupation is in fact injurious to the health or the physical comfort of the community in that locality an order under section 133 cannot be passed. The learned Magistrate himself, in paragraph 5 of his order, has mentioned that Dr. Benedict has stated in his cross-examination that he did not have any material before him to show that smoke emanating from the rice mill of the petitioner herein would affect the health of anybody. In para. 4 he has stated that on inspecting the site, he found that the smell was not apparent at that time. But, he would state that there were indications to show that if the soaking continued for some hours, the foul smell would be found to emanate. While concluding his discussions, in para. 15 of his order, he has not given any finding that an emergency exists causing injury to health or the physical comfort of the residents of the locality. As I have mentioned, section 133, Criminal Procedure Code, is attracted only in cases of emergency and imminent danger to the health or physical comfort of the community. The concluding portion of the Magistrate's order does not show that any such emergency exists.

1. A.I.R. 1961 Bom. 293.

5. For the above reasons, I find that the Magistrate is not justified in giving the directions as enumerated in his order, by resorting to summary procedure under section 133, Criminal Procedure Code.

6. Accordingly, the order of the Magistrate is set aside and the revision petition is allowed.

R.S. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P. S. Kailasam and C. J. R. Paul, JJ.*

Jacob A. Chakramakal *Appellant**

v.

Rosy J. Chakramakal *Respondenet*

Between:

Jacob A. Chakramakal *Petitioner*

and

Rosy J. Chakramakal *Respondent*

Guardians and Wards Act (VIII of 1890), *sections 7 and* 19—*Minors—Appointment of guardian—Application by father for declaration as guardian—Whether maintainable.*

It may be that an application (by the father) for appointment as a guardian may not be necessary by virtue of his status. But there is nothing in the Act (VIII of 1890) disabling the father from making such an application and claiming to be the guardian of a minor under the Guardians and Wards Act. [*Para.* 12].

Section 19 of Act VIII of 1890 does not debar a father from filing a petition for declaring him as the guardian of a minor. [*Para.* 17].

Cases referred to :—

Jacob A. Chakramakkal v. *Rosy J. Chakramakkal*, (1972) 2 M.L.J. 520; *Rosy Jacob* v. *Jacob*, A.I.R. 1973 S.C. 2090; *Satyanarayana* v. *Narasaiyamma*, 18 M.L.W.

* O.S. Appeal No. 94 of 1974.
28th February, 1975.

173 : 1923 M.W.N. 668 : 73 I.C. 948: A.I.R. 1924 Mad. 45 ; *Raghaviya* v. *Lakshmiah*, 48 M.L.J. 179 : 21 M.L.W. 244 : 86 I.C. 640: A.I.R. 1925 Mad. 398 ; *Annie Besant* v. *Narayaniah*, I.L.R. 38 Mad. 807 : 41 I.A. 314 : 27 M.L.J. 30 : 1 M.L.W. 520 : 24 I.C. 290: A.I.R. 1914 P.C. 41; *Sivasankara* v. *Radhabai*, (1939) 2 M.L.J. 515: 50 M.L.W. 520: 185 I.C. 647 : A.I.R. 1939 Mad. 611 ; *Venkateswaran* v. *Saradambal*, I.L.R. 13 Rang. 590; *Abubacker* v. *Mariyamma*, (1945) 2 M.L.J. 463 : 58 L.W. 587 : 223 I.C. 464: A.I.R. 1946 Mad. 110 ; *Kunhirama Kurup* v. *Narayanan Nambiar*, (1953) 2 M.L.J. 670 : A.I.R. 1954 Mad. 375 ; *Bai Tara* v. *Mohan Lal Lallubhai*, 24 Bom.L.R. 779; *Tej Begum* v. *Ghulam Rasul*, 83 I.C. 308; *Mt. Siddicunnisa* v. *Nizamuddin*, A.I.R. 1932 All. 215.

Appeal under clause 15 of the Letters Patent against the judgment and order of the Honourable Mr. Justice Mohan dated 10th December, 1974 and made in the exercise of the Ordinary Original Civil Jurisdiction of this Court.

K. Gopalachari, for Appellant.

K. N. Balasubramaniam and *K. Ramanarayanan*, for Respondent.

The Order of the Court was delivered by

Kailasam, J.—This appeal is filed under clause 15 of the Letters Patent against the order of Mohan, J. holding that the petition filed by the appellant-father praying for a declaration that he is the guardian of the persons of the minors and for the restoration of the custody of the minors to the father is not maintainable.

2. The petition is a continuation of a longstanding and bitter litigation between the father and the mother of the minor children. A suit O.M.S. No. 12 of 1962 was filed for judicial separation. Judicial separation was granted and certain directions were given regarding the custody of the minor children. The father filed O.P. No. 270 of 1970 for the custody of the minor children. There were three children out of the marriage, and custody of two minor children was given to the mother. The father preferred an appeal and the wife a memorandum of objections against the judgment in so far as it was against them, the father and the mother claiming custody of the three children. A Division Bench of this Court by its judgment reported in *Jacob A. Chakramakkal* v. *Rosy J. Chakramakkal*[1], held that the father is the proper person to be the guardian and entrusted the custody o the children to him. The mother took the matter to the Supreme Court, and the Supreme Court in *Rosy Jacob* v. *Jacob*[2], restored the order of the learned single Judge directing the custody of the two minor children to the mother. While disposing of the appeal, the learned Judges of the Supreme Court expressed their earnest hope that the two spouses would at least for the sake of happiness of their own off-spring, if for no other reason, forget the past and turn a new leaf in their family life, so that they can provide to their children a happy domestic home to which their children must be considered to be justly entitled. This hope which had been expressed by several learned Judges during the course of this long and bitter litigation has not yet been realised. In fact, an appeal to the same effect by us during the hearing of the appeal would not help the parties to bury the hatchet.

3. After the Supreme Court rendered its decision, the present petition, O.P. No. 103 of 1974 was filed by the father. The petition purports to be one under sections 7, 8, 10, 17, 19 and 25 of the Guardians and Wards Act, 1890 (Central Act VIII of 1890 hereinafter referred to as the Act). The relevant reliefs prayed for in the petition in paragraph 10 are as follows:

"The petitioner therefore prays that this Hon'ble Court may be pleased to order:

(*a*) that the petitioner be declared to be the guardian of the persons of the minors,

(*b*) that the minors are restored to the custody of the petitioner,

.........."

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1. (1972) 2 M.L.J. 520.
2. (1973) 1 S.C.C. 840: (1974) 2 S.C.J. 129 : (1974) 2 M.L.J. (S.C.) 34: (1973) 3 S.C.R. 918: A.I.R. 1973 S.C. 2090.

Mohan, J., who heard the petition framed four points for determination and they are (1) inasmuch as the Supreme Court has decided the issue of guardianship, on the principle of *res judicata* whether the present petition is barred (2) having regard to the language of section 48 of the Act, whether the order of the Supreme Court has become final and is not liable to be decided otherwise, (3) having regard to the principle of comity of Judges, whether, the matter cannot be re-agitated, and (4) since under law, the father himself is the guardian, whether an application for declaration under section 7 of the Act will not lie, in other words, is redundant.

4. The learned Judge found that the decision of the Supreme Court barred the present petition on the principle of *res judicata*. On the second question, he found that the proper construction to be placed on section 48 of the Act is that the civil proceedings are barred, but that does not mean that where the Court has not decided the question of guardianship in a prior application, the bar under section 48 could be invoked. The learned Judge felt it unnecessary to go into the principle of comity of Judges as in his view, the present petition is barred by the earlier Supreme Court judgment. On the fourth point, the learned Judge found that though the father is in law the guardian in the absence of any unfitness, that does not mean that he would be disentitled to file the application in proper cases.

5. In the appeal before us, it was contended by the learned counsel for the appellant-father that the judgment of the Supreme Court would not bar the present petition as the principle of *res judicata* is not applicable, and the learned counsel for the respondent on the other hand while supporting the view of the learned Judge that the petition was barred by the principle of *res judicata*, contended that the learned Judge was in error in holding that an application for guardianship under section 7 of the Act was maintainable by the father. The question as to whether an order under the Act would be final and as such this petition is not maintainable would depend upon the fact whether relief under section 7 of the Act is barred by the Supreme Court judgment and therefore need not be separately considered. The point as to the principle of comity of Judges was not considered by the learned Judge and was also not pressed before us for decision.

6. The first question that arises for consideration is whether the decision of the Supreme Court bars the present petition on the principle of *res judicata*. The present petition as already referred to was filed under sections 7, 8, 10, 17, 19 and 25 of the Act, and the reliefs claimed were for declaration of the appellant-father as the guardian of the person of the minors and for restoration of the minors to the custody of the appellant-father. The relevant sections of the Guardians and Wards Act are 7, 17, 19 and 25. Chapter II comprises section 5 to section 19 they relate to the appointment and declaration of guardians, Section 7 of the Act reads thus:—

> "7 (1) Where the Court is satisfied that it is for the welfare of a minor that order should be made
>
> (*a*) appointing a guardian of his person or property, or both, or
>
> (*b*) declaring a person to be such a guardian, the Court may make an order accordingly".

The Court by this section is empowered to appoint a guardian or to declare a person to be such a guardian, if it is satisfied that it is for the welfare of a minor. Section 17 runs as follows:

> "17. (1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject-appears in the circumstances to be for the welfare of the minor.
>
> (2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations

of the proposed guardian with the minor or his property.

(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference".

Section 19 (*b*) of the Act runs as follows:

"Nothing in this chapter shall authorise the Court to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards or to appoint and declare a guardian of the person of a minor whose father is living and is not, in the opinion of the Court, unfit to be guardian of the person of the minor, or..........."

This section does not authorise the Court to appoint or declare a guardian of the person of a minor whose father is living and is not in the opinion of the Court, unfit to be guardian of the person of the minor. The requirements of the provisions of sections 7, 17, and 19 of the Act will have to be borne in mind by a Court before appointing or declaring a guardian of the person of the minor. Chapter III of the Act deals with the duties, rights and liabilities of guardians. Section 25 (1) of the Act runs as follows:

"If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return, and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian".

This sub-section enables the Court to cause the ward to be arrested and delivered into the custody of the guardian, if the ward leaves or is removed from the custody of the guardian of his person, and if the Court is of opinion that it will be for the welfare of the ward to return to the custody of his guardian. Before a petition under section 25 of the Act could be maintained, the person applying for relief should be the guardian of the person of the minor who has been removed. If the petition under section 25 of the Act proceeded on the basis that the petitioner was the guardian and relief as to custody of the minor was denied to him, even though he was a guardian, a fresh petition for his being declared as the guardian under section 7 of the Act and for custody would not be maintainable, for the relief as to custody of the minor would have been considered only on the basis that he was the guardian. Therefore, generally speaking, when custody of the minors had been denied to the father presuming him to be the guardian, a fresh petition by him for declaring him as the guardian and thereafter praying for custody of the minors as a guardian would not be maintainable.

7. Though *prima facie* the petition is not maintainable, the learned counsel for the appellant-father submitted that certain observations of the Supreme Court will make it clear that the filing of a petition under section 7 of the Act was kept open in the prior proceedings. In order to appreciate this contention, we will refer to the various passages relied on by either of the parties in the Supreme Court judgment in *Rosy Jacob* v. *Jacob*[1]. The last sentence in the first paragraph runs as follows:—

"The short question which we are called upon to decide relates to the guardianship of the three children of the parties and the solution of this problem primarily requires consideration of the welfare of the children."

On behalf of the respondent-mother it was submitted that what was decided by the Supreme Court related to the guardianship of the three minor children and a petition for declaration of the appellant-father as the guardian of the minors would not lie now as it was specifically covered in the point that was determined by the Supreme Court. The Supreme Court quoted the second point that arose for judicial determination before the learned single Judge of the High Court who heard O. P. No. 270 of 1970 as follows:

"What is the proper order to pass as regards the custody of the three child-

1. (1973) 1 S.C.C. 840 : (1974) 2 S.C.J. 129: (1974) 2 M.L.J. (S.C.) 34 : (1973) 3 S.C.R. 918: A.I.R. 1973 S.C. 2090.

ren of the marriage in the light of the events that have occurred subsequent to the judgment of the appellate Court and under the Guardians and Wards Act ?

It may be noted that the point as set out here refers to the custody of the three children. The petition O.P. No. 270 of 1970 was for the custody of the minor children under section 25 of the Guardians and Wards Act. A contention was raised on behalf of the respondent-mother that the Guardians and Wards Act would be inapplicable to cases where orders have been made in matrimonial proceedings and section 19 of the Guardians and Wards Act cannot govern the custody of children given by a consequent decree under the Indian Divorce Act. In dealing with this point, the Supreme Court held that the Court under the Divorce Act would be incompetent to make any order under sections 41 and 42 with respect to the elder son and the daughter in the present petition as they have passed the age contemplated under the Indian Divorce Act. On this ground on behalf of the father it was claimed that he had a right to invoke section 25 of the Act and it was further pleaded that if section 25 of the Act was not applicable, then the petition O.P. No. 270 of 1970 should be treated to be one under section 19 of the Act or under any other competent section of the Act so that he could get custody of the children denied to him by the mother. The answer to this contention on behalf the mother, the respondent herein, was that the proper procedure which the father ought to have adopted was to apply under section 7 of the Act and if such a petition had been made, it would have been tried in accordance with the provisions of that Act. The above passage indicates that while on behalf of the father the Court was requested to treat the petition to be one under section 7 of the Act, on behalf of the mother it was contended that the petition cannot be treated to be one under section 7 of the Act. Dealing with this contention the Supreme Court observed that if the Court under the Divorce Act cannot make any order with respect to the custody of Ajit *alias* Andrew and Maya *alias* Mary and it is not open to the Court under the Guardians and Wards Act to appoint or declare guardian of the person of his children under section 19 during his lifetime, if the Court does not consider him unfit, then, the only provision to which the father can have resort for his children's custody is section 25. The above sentence would indicate that when the court under the Divorce Act cannot make any order with respect to the custody of the two minors who have passed the age it is not open to the Court under the Guardians and Wards Act to appoint or declare guardian of the person of his children under section 19 during his lifetime, the only relief that was available to the father is under section 25 of the Act. This might imply that a father cannot apply during his lifetime to be appointed or declared as guardian. If this position is taken as the law declared by the Supreme Court, this Court will be bound by it and a petition by the father for his being appointed or declared guardian should be held to be not maintainable under the Guardians and Wards Act. But this statement of the Supreme Court, it was contended by the learned counsel for the appellant-father, is not law declared, but was only a passing observation. We will deal with this question when we consider the objection of the learned counsel for the respondent that a petition by the father for appointment or for declaration as a guardian is not maintainable.

8. Dealing with child Mahesh *alias* Thomas, at the time when the appeal was heard by the Supreme Court, the Court under the Divorce Act was empowered to make suitable orders, relating to his custody, maintenance and education, and therefore the Supreme Court felt somewhat difficult to impute to the Legislature an intention to set up another parallel Court to deal with the question of the custody of a minor which is within the power of a competent Court under the Divorce Act. The Supreme Court therefore declined to accede to the plea of the father that his application should be considered to have been preferred for appointing or declaring him as the guardian. The plea that he may be appointed or declared as the guardian

is a relief under section 7 of the Act and if he is appointed as the guardian, he can ask for custody of the minors if he satisfies the other requirements of the Act. Though the Supreme Court declined to treat the application to be one under section 7 of the Act, it proceeded on the basis that the father was the guardian and considered the question as to whether as a guardian in the circumstances of the case, he would be entitled to the custody. The Supreme Court dealing with the contention that if the father is not unfit to be the guardian of his minor children, then the question of their welfare does not arise at all, held that such a contention is to state the proposition too broadly and may appear somewhat misleading. This passage would indicate that on behalf of the father custody was claimed under section 19 of the Guardians and Wards Act which provides that the Court is not authorised to appoint or declare a guardian of the person of a minor whose father is living and is not in the opinion of the Court unfit to be a guardian of the person of the minor. On the basis of the section the plea was that being the father and being not unfit to be the guardian of the person of the minors, no other person could be appointed or declared as the guardian and therefore the father is entitled to the custody of the children. As already stated, this plea was negatived by the Supreme Court by saying that the contention that if the father is not fit to be the guardian of the minor children, then the question of their welfare does not arise at all, is to state the proposition too broadly. Therefore, it is clear that the Supreme Court proceeded on the basis that the appellant-father was the guardian and not disqualified to be a guardian, but yet under section 25 of the Act, he will not be entitled to the custody as it was not in the welfare of the children. The Supreme Court observed that the father's fitness cannot override considerations of the welfare of the minor children, and though the father has been presumed by the statute generally to be better fitted to look after the children, the Court in each case has to see primarily to the welfare of the children in determining the question of their custody in the background of all the relevant facts having a bearing on their health, maintenance and education. The Supreme Court referring to the decisions on the question of right to be appointed or declared as the guardian and thereby granted custody of his minor children under section 25 read with section 19 of the Act observed that those decisions to the extent they go against the view expressed by the Court must be held to be wrongly decided. On a reading of the judgment of the Supreme Court it is clear that the Court directed the custody of the children to the mother after taking into account the position of the father who is not unfit to be the guardian of the minor children. In the circumstances, the relief asked for in the petition in O.P. No. 103 of 1974 for an order directing the minors to be restored to the custody of the petitioner cannot be ordered, even though the petitioner-father may be declared to be the guardian of the person of the minors.

9. We will now refer to the question, as to whether it is open to the appellant-father to seek a declaration that he is the guardian of the person of the minors, even though he is not entitled for restoration of the custody of the minors. In the petition, the father has stated that no guardian has so far been appointed by the Court and no application was made with respect to the guardianship of the minors and that the present petition was made for a declaration that the appellant-father was the guardian of the person of the minors and for restoration of custody to him. Paragraph 8 of the petition starts by saying that the petition is for declaration and custody made on the grounds mentioned. Thus it will be seen that the relief sought for by the petitioner is to be declared as the guardian though in asking for such a declaration the relief for restoration of the custody of the minors is also included which relief we have already found that the petitioner is not entitled to. The Supreme Court in disposing of the appeal before it was not called upon to consider whether the father is entitled to be declared as the guardian, though in stating the short question for consideration, the Court stated that what it was called upon to decide related to the guardianship of the three children of the

parties. The body of the judgment makes it clear that it was dealing only with the custody of the children under section 25 of the Act even though in deciding the question it took into account the preferential position of the father under the Act. The plea therefore that the issue as to the guardianship has not been decided as such in the earlier proceeding has to be accepted. It has to be held that as this question as to the guardianship has not been adjudicated, the father will be entitled to maintain a petition so far as the first relief, that is, the petition for his being declared as the guardian, is not barred by the principle of *res judicata* by the decision of the Supreme Court. In considering this petition, the Court will take into account the several provisions in the Act which it is called upon to take into account before appointing a guardian, particularly sections 7, 17 and 19 of the Act. A petition by the father need not always be redundant for it may well be contended that the Court need not make an order declaring a guardian under the Act if it is not for the welfare of the minor. The petition may be opposed on grounds that may be open under the law.

10. It was strongly urged by Mr. K. N. Balasubramaniam, learned counsel for the respondent-mother that the father is not entitled to maintain an application under section 7 of the Act for his being declared as a guardian under the Act. Section 7 provides that for the welfare of the minor, if the Court is satisfied that the order should be made declaring a person to be such a guardian, the Court may make an order accordingly. On a reading of the section there appears to be no objection to the father being declared as a guardian if the welfare of the minor required it. Section 17 requires that in declaring a guardian, the Court shall be guided by what consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor. This section also does not in any way bar the father applying for being declared as the guardian of the minor. Section 19 (*b*) of the Act provides that nothing in Chapter II which relates to appointment and declaration of guardians, shall authorise the Court to appoint or declare a guardian of the person of a minor whose father is living and is not, in the opinion of the Court, unfit to be guardian of the person of the minor. This sub-section has given rise to a controversy and the learned counsel for the respondent-mother referred to certain decisions which would construe the section as debarring the father from maintaining a petition for his being declared as a guardian. Before referring to the decisions, we would point out that this point was not taken before the Supreme Court or in any other proceedings. The contention on behalf of the mother who was the appellant before the Supreme Court was that the father ought to have applied under section 7 of the Guardians and Wards Act and the plea of the father was that if the petition under section 25 was found to be defective, it could be converted into one under section 7. Though the Supreme Court did not permit the father to convert the application to be one under section 7, it has to be held that an application under section 7 is not maintainable. The only passage which may be taken as referring to this aspect is the one where the Court has observed that if the Court under the Divorce Act cannot make any order with respect to the custody of Ajit *alias* Andrew and Maya *alias* Mary and it is not open to the Court under the Guardians and Wards Act to appoint or declare guardian of the person of his children under section 19 during his lifetime, if the Court does not consider him unfit, then the only provision to which the father can have resort for his children's custody is section 25. From this observation, it was submitted that the Court has ruled that the Court under the Guardians and Wards Act cannot appoint or declare the father as the guardian of the person of the minor under section 19 during his lifetime. This statement of the Supreme Court is hypothetical and cannot be construed as laying down the law that an application under section 7 is not open because of section 19. Having found that the Supreme Court has not held that a petition under section 7 by the father is not maintainable, we will proceed to refer to the decisions cited before us,

11. In *Satyanarayana* v. *Narasaiyamma*[1], a Bench of this Court held that if a third party applies, he shall not be appointed or declared a guardian of the person of a minor whose father is living and is not, unfit, and if the father is the applicant the section has no application. In *Raghaviya* v. *Lakshmiah*[2], the question as to whether the father can ask for a declaration that he is the guardian was considered by a Bench. Venkatasubba Rao, J. took the view that the law was correctly laid down in *Satyanarayana* v. *Narasaiyamma*[1]; while Jackson, J. took a different view. Venkatasubba Rao, J., observed, after referring to section 19 (*a*) of the Act that the section recognised the preferential right of the husband or the father as the case may be and provided for the safeguarding of such right, and it was not intended to impose a disability upon either of them, but on the contrary, the plain intention of the section is that in the case of a married female no one other than a husband shall be appointed her guardian unless he is unfit to be such and in the case of a minor child none but the father, excepting when it is proved that he is not fit to be its guardian. A decision of the Privy Council in *Annie Besant* v. *Narayaniah*[3], was cited before the Bench in support of the proposition that the father cannot maintain a petition for being declared as a guardian. The observation relied on runs as follows :

> "And further no order declaring a guardian should by reason of the 19th section of the Guardians and Wards Act, 1890 be made during the respondent's life unless in the opinion of the Court he was unfit to be their guardian, which was clearly not the case."

The Privy Council was not dealing with the propriety of the order appointing the plaintiff as the guardian. The observation in the circumstances was held by Venkatasubba Rao, J. as *obiter* and in the absence of any indication in the judgment that their Lordships of the Privy Council gave a considered opinion on the question, the learned Judge was not prepared to hold that they intended to decide finally the meaning of section 19. Scrutinising the observation of the Privy Council, we are unable to construe it as laying down that the father cannot maintain a petition for being appointed as a guardian. What it says is that under section 19 no order declaring a guardian should be made during the respondent's lifetime (father's lifetime) unless in the opinion of the Court he was unfit to be the guardian which was clearly not the case. This in our view would only mean that all that the Privy Council did was to paraphrase section 19 but did not purport to lay down that the father cannot maintain an application. Jackson, J., who was the other learned Judge in *Raghavaiya* v. *Lakshmiah*[1], expressed a contrary view in the following terms :—

> "Whether the dictum in *Besant* v. *Narayaniah*[2], is *obiter* or otherwise I think it expresses the plain meaning of the statute and under section 19 the Court is not authorised to declare anybody *not even the father* as guardian of the person of a minor whose father is living and in the opinion of the Court is not unfit. Whether this was the intention of the legislature or whether a contrary intention has been defeated by defective drafting, I am not prepared to say.".

Neither the section (section 19), nor the passage referred to in the decision of the Privy Council states that the Court is not authorised to declare anybody as guardian not even the father. The construction that not even the father can be appointed is not warranted either under the section or on the wording of the judgment of the Privy Council. We are in respectful agreement with the view taken by Venkatasubba Rao, J. and are of the opinion that the father could maintain a petition under section 7 for his being declared as the guardian.

12. A few decisions rendered subsequently were relied on by the learned counsel for the respondent-mother. In *Siva-*

1. 18 M.L.W. 173: 73 I.C. 948: A.I.R. 1924 Mad. 45.
2. 48 M.L.J. 179 : 86 I.C. 640 : A.I.R. 1925 Mad. 398.
3. I.L.R. (1915) 38 Mad. 807 : 27 M.L.J. 30 : 41 I.A. 314: A.I.R. 1914 P.C. 41.

1. 48 M.L.J. 179 : 86 I.C. 640 : A.I.R. 1925 Mad. 398.
2. 27 M.L.J. 30 : I.L.R. (1915) 38 Mad. 807: 41 I.A. 314: A.I.R. 1914 P.C. 41.

sankara v. *Radhabai*[1], the question arose as to whether a Hindu father had a right to the custody of his minor daughter. When the marriage of the minor daughter was about to be settled, the father disapproved of the choice and applied under the Guardians and Wards Act praying for an order appointing him as a guardian of the person and property of the minor. He also prayed that the first respondent should be directed to hand over the custody of the minor to him and the first respondent should be restrained by an injunction from giving away the minor in marriage to the second respondent. The application was heard originally by Gentle, J. who treated it as one falling under section 25 of the Act, and on the ground that the appellant had abandoned the minor dismissed the petition. An appeal was preferred by the father to a Bench of this Court and the Bench dismissed the appeal holding that the father is certainly not a person in whose favour the Court should pass an order under section 25 of the Act, and it is abundantly clear that the minor will be in far better custody if she remained with the first respondent. Repelling the contention that even under the circumstances the injunction against the marriage may be granted, the Court held that such a relief cannot be obtained under any of the provisions of the Act and observed that if the appellant wished to take other proceedings, he was at liberty to do so, but having failed in his application under section 25 of the Act, he was not entitled to any order on the present application. What the Court considered was a petition under section 25 of the Act, and the question as to whether an application by the father for his being appointed as the guardian could be maintained or not did not arise for disposal in the appeal. But the Bench observed that the appellant-father is not entitled to apply under the Act for an order appointing him as the guardian of the person or the property of the minor on the ground that under the Hindu Law, the father is the lawful guardian of his child and a declaration by the Court cannot increase his powers. For the above observation, Leach, C.J. speaking for the Bench relied on *Venkateswaran* v. *Saradambal*[1] and the fact that the learned advocate did not challenge the correctness of the decision rendered by him. Apart from the observation being in the nature of an *obiter* the reason given that as under the Hindu Law the father is the lawful guardian, he is not entitled to apply for his being appointed as the guardian, has no support in law. It may be that such an application for appointment as a gurdian may not be necessary by virtue of his status. But as far as we could see there is nothing in the Act disabling the father from making such an application and claiming to be the guardian under the Guardians and Wards Act. In the circumstances, we do not think that the observation which is in the nature of *obiter* is binding on us.

1. (1939) 2 M.L.J. 515 : 50 L.W. 520 : A.I.R. 1939 Mad. 611.

13. In *Abubacker* v. *Mariyamma*[2], the same learned Judge (Leach, C.J.) reiterated the view. A Muhammadan father applied for an order appointing him the guardian of his children by the respondent. Subsequently he amended the petition and asked for an order of the Court requiring the respondent to return the children to his custody. The District Judge dismissed the petition. On appeal the Bench observed that a Muhammadan father being the lawful guardian of his minor children does not require an order of the Court to support his right to act as their guardian and in fact an application under the Guardians and Wards Act for an order appointing him guardian does not lie. The petition which the Bench was dealing with was one under section 25 of the Act and the observation that a petition under the Guardians and Wards Act by the father for appointing him as the guardian does not lie, was not necessary for the disposal of the petition before the Court. In this view, the observation is in the nature of an *obiter dictum* and therefore not binding on us.

14. In *Kunhirama Kurup* v. *Narayanan Nambiar*[3], Mack, J. after a consideration of the decisions in *Venkateswaran* v.

1. I.L.R. (1935) 13 Rang. 590.
2. (1945) 2 M.L.J. 463 : 58 L.W. 587 : 223 I.C. 464 : A.I.R. 1946 Mad. 110.
3. (1953) 2 M.L.J. 670 : A.I.R. 1954 Mad. 375.

Saradambal[1], *Sivasankara* v. *Radhabai*[2] and *Annie Besant* v. *Narayaniah*[3] held that he could not regard the line of decisions as ruling out under all circumstances an application by a father to be declared the guardian of person and property of his minor child.

15. In *Bai Tara* v. *Mohan Lal Lallubhai*[4] it was held that an application by a Hindu father under the Guardians and Wards Act, for his being declared as a guardian is not competent. In *Tej Begum* v. *Ghulam Rasul*[5] the Court following the decision in *Annie Besant* v. *Narayanaiah*[3], expressed the view that the legislature did not intend that the Act should apply to a father as the provision was superfluous.

16. The decision of the Allahabad High Court in *Mt. Siddicunnisa* v. *Nizamuddin*[6], was cited by the learned counsel for the respondent-mother. We do not find any passage in which the Court has ruled out an application by the father for being appointed as the guardian of the minors under the Guardians and Wards Act. What the Court has stated is that the section means not only that in the presence of the husband or the father no one else should be given preference, when either of them is fit to be appointed the guardian, but on its language it even ousts the jurisdiction of the Court altogether and prevents it from appointing even the husband or the father as a guardian when both of them are not unfit to be the guardian. This passage is explained later in the judgment by Sulaiman, Ag.C.J. thus :—

> "In my opinion the legislature intended that nobody should be appointed or declared the guardian at all when the husband and the father are alive and both of them are not unfit, without attempting to settle the competition between them which may arise under the personal law."

1. (1935) I.L.R. 13 Rang. 590.
2. (1939) 2 M.L.J. 515 : 50 L.W. 520 : A.I.R. 1939 Mad. 611.
3. I.L.R. (1915) 38 Mad. 807 : 41 I.A. 314 : 27 M.L.J. 30 : A.I.R. 1914 P.C. 41.
4. (1922) 24 Bom.L.R. 779.
5. (1924) 83 I.C. 308.
6. A.I.R. 1932 All. 215.

17. For the reasons stated, we are unable to agree with the view of the Lahore or the Bombay High Court that an application by the father for his being appointed as guardian of the person of the minor is not maintainable under the Act. We are of the view that the observation made in *Sivasankara* v. *Radhabai*[1] and *Abubacker* v. *Mariyammal*[2] are in the nature of *obiter dicta* and are not binding on us. We are satisfied on a reading of the relevant provisions of the Act that a petition by the father for declaring him as the guardian of a minor is maintainable and that section 19 does not debar him from making such a petition. In coming to this conclusion we respectfully agree with the view taken by Venkatasubba Rao., J., in *Raghaviaya* v. *Lakshmiah*[3], the observations of the Bench in *Satyanarayana* v. *Narasaiyamma*[4] and the observation of Mack, J., in *Kunhirama Kurup* v. *Narayanan Nambiar*[5].

18. In the result, we hold that the petition by the appellant-father for his being declared as the guardian of his children is maintainable. We also hold that the relief for a declaration that he is the guardian of the minor children is not barred by the decision of the Supreme Court in *Rosy Jacob* v. *Jacob*[6]. We also hold that so far as the second relief praying that the children be restored to the custody of the appellant-father is concerned, it is barred by the said decision of the Supreme Court. But as observed by the Supreme Court, with the changed conditions and circumstances, including the passage of time, the Court is entitled to vary such orders if such variation is considered to be in the interest of the welfare of the wards. We refrain from stating whether any change of conditions or circumstances have been made out in the original petition. It is for the trial Court to decide the question. The appeal is allowed to the extent indicated above. There will be no order as to costs in this appeal.

S.J. —— *Appeal allowed.*

1. (1939) 2 M.L.J. 515 : A.I.R. 1939 Mad. 611.
2. (1945) 2 M.L.J. 463 : A.I.R. 1946 Mad. 110.
3. 48 M.L.J. 179 : 86 I.C. 640 : A.I.R. 1925 Mad. 398.
4. A.I.R. 1924 Mad. 45.
5. (1953) 2 M.L.J. 670 : A.I.R. 1954 Mad. 375.
6. (1973) 1 S.C.C. 840 : (1974) 2 S.C.J. 129 : (1974) 2 M.L.J. (S.C.) 31 : (1973) 3 S.C.R. 918 : A.I.R. 1973 S.C. 2090.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P. R. Gokulakrishnan, J.*

Janaki Ammal *Petitioner**

v.

Muthiah Thevar *Respondent.*

Tamil Nadu Cultivating Tenants Protection Act (XXV *of* 1955), *section* 3 (3)—*Tamil Nadu Act* (*XXI of* 1972), *section* 3 (1) (a)—*Application by tenant depositing rent under Act XXV of* 1955—*Pending application, Act XXI of* 1972 *coming into force—Oral application by tenant in Court invoking Act XXI of* 1972—*Authorised Officer converting application into one filed under Act XXI of* 1972—*Whether valid.*

There is absolutely nothing wrong in the order passed by the Authorised Officer converting the application filed under section 3 (3) of Act XXV of 1955 into one under Act XXI of 1972, even though it has not been so stated in such specific terms.

[*Para.* 4].

Petition under section 6 (*b*) of the Tamil Nadu Cultivating Tenants Protection Act XXV of 1955 praying the High Court to revise the order of the Court of the Authorised Officer (Land Reforms) Ramanathapuram at Madurai dated 30th March, 1974 and made in T.C.T.P. No. 66 of 1972.

R. S. Ramanujam, for Petitioner.

K. Govindarajan, for Respondent.

The Court made the following

ORDER.—This revision petition arises out of the order passed in T.C.T.P. No. 66 of 1972 dated 30th March, 1974 on the file of the Authorised Officer (Land Reforms) Ramanathapuram at Madurai. The said petition was filed by the tenant under section 3 (3) and rule 3 of Act XXV of 1955 depositing Rs. 540 towards the rent payable to the landlord for one year from 1st July, 1971. The prayer in that petition is that the landlord may be directed to receive the rent deposited. This petition is in accordance with section 3 (3) of the Cultivating Tenants Protection Act XXV of 1955 which says that—

"A cultivating tenant may deposit in Court the rent or, if the rent is payable in kind, its market value on the date of the deposit to the account of the landlord".

While the petition was pending Tamil Nadu Act XXI of 1972 came into being in order to provide relief to cultivating tenants in respect of certain arrears of rent. As per section 3 (1) (*a*) of Act XXI of 1972:

"All arrears of rent payale by a cultivating tenant to the landlord and outstanding on the 30th June, 1971 (hereinafter referred to as arrears of rent) shall be deemed to be discharged, whether or not a decree or order has been obtained therefor, if such cultivating tenant—

(*i*) has before the date of the publication of this Act paid to the landlord or deposited in the Court or before the competent authority to the account of the landlord, or

(*ii*) pays or deposits in the manner specified in clause (*b*) within six months from the date of the publication of this Act; or

(*iii*) is deemed to have paid or deposited under this Act: the whole of the rent due for the fasli year commencing on the 1st July, 1971 and ending with the 30th June, 1972 (hereinafter referred to as the current rent)".

Section 4 of Act XXI of 1972 contemplates an application by the cultivating tenant to reopen the proceeding and pass an order that the rent so paid or deposited shall be deemed to have been paid or deposited towards the current rent.

2. While the application was pending, the tenant invoked the provisions of Act XXI of 1972 in the open Court to the knowledge of the respondent, orally and prayed that inasmuch as the rent due for the fasli year commencing from

* C.R.P. No. 2708 of 1974.

27th February, 1975.

1st July, 1971 and ending with 30th June, 1972 has been paid by the petitioner (tenant) it should be deemed to be current rent deposited by the petitioner. On this representation the landlord, who is the petitioner herein, contended that the scopes contemplated under Act XXV of 1955 and Act XXI of 1972 are different and as such the petitioner (tenant) cannot be given relief under Act XXI of 1972. The Authorised Officer, holding that the deposit made by the petitioner (tenant) is in accordance with the lease agreement, and also observing that the landlord had notice of the prayer made by the tenant to invoke the provisions of Act XXI of 1972, granted the relief to the tenant under Act XXI of 1972.

3. Mr. Ramanujam, learned counsel appearing for the petitioner (landlord) submits that section 4 of the Act contemplates an application and since no application has been filed invoking the provisions of Act XXI of 1972, the Court below has no jurisdiction to grant the relief to the respondent herein.

4. It is clear from the facts of this case that the tenant made representation to the Court in virtue of Act XXI of 1972 that he may be given relief inasmuch as he has paid the agreed rent for the period 1st July, 1971 to 30th June, 1972 on 27th June, 1972. Actually the Act XXI of 1972 came into force only on 11th August, 1972. At that time the petition was pending. There is nothing wrong in the order passed by the Authorised Officer to the effect that the prayer made by the tenant can be taken as an application filed under Act XXI of 1972. In effect, it means that the Authorised Officer converted the application under section 3 (3) of Act XXV of 1955 into one under Act XXI of 1972. It is clear from the intention of the Legislature that these Acts are provided to benefit the cultivating tenants. To direct the tenant to file a separate application technically, will be going behind the spirit of the legislations intended to benefit the cultivating tenants. I am of the view that there is absolutely nothing wrong in the order passed by the Authorised Officer converting the application filed under section 3 (3) of the Act XXV of 1955 into one filed under Act XXI of 1972, even though it has not been so stated in such specific terms.

5. I consider that the Authorised Officer has ample power to treat the application filed by the respondent herein as one filed under Act XXI of 1972 and the relief granted can be easily taken as one under the provisions of Act XXI of 1972.

6. Mr. Ramanujam submits that the Authorised Officer, has not decided the exact rent payable by the tenant. It is clear from the petition filed by the respondent herein that according to the lease agreement, he is liable to pay 6¾ pothis of paddy. The tenant has also stated that even though the market value is less, he is calculating the rate of paddy at Rs. 80 per pothi and he is depositing Rs. 540 as per that calculation. The landlord, excepting stating that the amount deposited is not correct, has not given any figure as to the market value of paddy or pothi. The Court below found that the amount deposited is in accordance with the lease agreement. Hence, I am of the view that the finding that the correct lease amount has been deposited is in order.

7. In the circumstances, I do not find any miscarriage of justice or question of jurisdiction involved in this revision petition for me to interfere with the order passed by the Court below. The civil revision petition is dismissed and there will be no order as to costs.

S.J. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—*K. Veeraswami, CJ. and S. Natarajan, J.*

K. Yusuf Sheriff and others

.. *Appellants**

v.

K. Akbar Sheriff and others

.. *Respondents.*

Arbitration Act (X of 1940), section 34—Suit for partition and dissolution of partnership—Arbitration clause in partnership deed—Arbitrator, husband of one of the partners—Whether adverse inference can be drawn aginst arbitrator.

It cannot be assumed from the mere relationship of the arbitrator with one of the members of the partnership that the arbitrator would act otherwise than impartially. [*Para.* 2.]

Cases referred to :—

U. P. Co-operative Federation Ltd. v. *Sunder Bros. Delhi*, A.I.R. 1967 S.C. 249 ; *Printers (Mys.) Private Ltd.* v. *P. Joseph*, (1960) 3 S.C.R. 713 : (1962) 1 S.C.J. 274 : (1962) 1 M.L.J. (S.C.) 127 : (1962) 1 An.W.R. (S.C.) 127: A.I.R. 1960 S.C. 1156.

Appeal against the order of the Court of the Additional Subordinate Judge, Vellore, dated 16th January, 1975 and made in I.A. No. 1524 of 1974 in O.S. No. 312 of 1974.

R. Krishnamurthy and *A. R. Lakshmanan* for Appellants.

O. R. Abdul Kalam, for Respondents 1 to 3.

The Judgment of the Court was delivered by

Veeraswami, CJ.—This appeal is by defendants 1 and 3 to 8 from an order of the Subordinate Judge of Vellore. He declined to grant stay under section 34 of the Arbitration Act of 1940. On 5th March, 1972 a partnership deed was entered into between the parties which provided for settlement, by arbitration, of all disputes arising between the parties in the partnership. The husband of one of the partners was named as the Arbitrator. This relationship, and there is no dispute about it, was known to all the parties concerned at the time the partnership agreement was entered into. Notwithstanding the arbitration clause, the plaintiffs-respondents instituted a suit for partition and also dissolution of the partnership. The appellants have no objection to the suit being proceeded with so far as it related to partition, but resist the suit in respect of the relief for dissolution of the partnership on the ground that it should be dealt with in arbitration. The Subordinate Judge declined to grant stay, as, in his view the Arbitrator's wife, who was one of the partners, according to the plaintiffs, was responsible for expelling the plaintiffs from the firm and the arbitrator was not likely to be impartial and also that the suit was a composite one since there was also the relief for partition asked for.

2. In our opinion, the order of the Subordinate Judge cannot be supported. As we already indicated, the partners knew full well when the partnership-agreement was entered into the relationship between the Arbitrator and one of the partners. Nothing has been said or proved against the named Arbitrator either by his conduct or by expression or other circumstances that he would be partial or would act with bias as Arbitrator. The allegation that the Arbitrator's wife, as a member of the partnership, was responsible for expelling the plaintiffs, could not reasonably give rise to the inference that her husband would not act impartially when he was called upon to serve as an Arbitrator. *U.P. Co-operative Federation Ltd.* v. *Sunder Bros. Delhi*[1], relied on by the respondents is distinguishable. In that case, the Registrar of Co-operative Societies himself was the *ex-officio* President of the society and it was with his approval the agreement in dispute there was termina-

* A.A.O. No. 73 of 1975.

2nd April, 1975.

1. A.I.R. 1967 S.C. 249.

ted. That being so, the Supreme Court was of opinion that the Registrar would not possibly be impartial as he was a party to the cancellation of the agreement. The relationship, here was already known, there is nothing to point to the Arbitrator being likely to be biased in any way against the plaintiffs. We cannot assume from the mere relationship of the Arbitrator with one of the members of the partnership that the Arbitrator would act otherwise than impartially. *Printers (Mys.) Private Ltd.* v. *P. Joseph*[1] to which our attention was invited for the respondents, lays down the general principle which should govern exercise of the discretionary power under section 34 of the Arbitration Act. In that case, the following observation is pertinent to the view we have taken in this case :

> "In exercising its discretion under section 34 the Court should not refuse to stay the legal proceedings merely because one of the parties to the arbitration agreement is unwilling to go before an arbitrator and in effect wants to resile from the said agreement nor can stay be refused merely on the ground that the relations between the parties to the dispute have been embittered....."

In this case, there is not even an allegation that there was any such embitterment. The parties have, with open eyes and knowing the fact of the relationship, named the husband of one of the partners as Arbitrator, and we do not see why the plaintiffs-respondents should be allowed to get out of the agreement. If any foundation had been laid for their alleged apprehension that the Arbitrator might not be impartial, one can understand that. But that is not the case here.

3. The other ground is that the suit is a composite one and, therefore, no stay should be granted. But that circumstance, in our opinion, will not help the plaintiffs. As already mentioned, the appellants have no objection to the suit being proceeded with in so far as it relates to partition. If there should be any difficulty in making partition without the dissolution of the partnership decided upon and the rights are arbitrated, that part of it will, of course, have to wait. On this ground, we do not see why stay should be refused. The appeal is allowed with costs.

S.J. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*V. Ramaswami, J.*

P. Thirumalai .. *Petitioner**

v.

M. P. Kottamalai Ammal .. *Respondent.*

Tamil Nadu Court-fees and Suits Valuation Act (XIV of 1955), *section* 54—*Civil Procedure Code (V of* 1908), *Order* 47—*Second Appeal —Disposal by Single Judge —Petition to review—Allegation of market value of property being over Rs.* 20,000—*Plea that Second Appeal ought to have been disposed of by a Division Bench—Objection not raised at any stage of the proceeding regarding valuation—Maintainability of review petition—High Court Appellate Side Rules, Order* 1, *rule* 2 (5) (*c*)—*Constitution of India,* (1950), *Article* 133.

In a suit where the Court-fee payable depends on the market value of the suit property and the defendant questions the valuation on the ground that the suit property has been under-valued and if it had been properly valued, it would affect the jurisdiction of the trial Court, he ought to take that objection even at the stage of his filing a written statement and, if he had not questioned the same, after the disposal of the suit he could not take up that plea in the appellate stage unless he satisfies the two exceptions provided in section 54 itself of the Tamil Nadu Court-fees and Suits Valuation Act, 1955.

[*Para.* 2.]

Even if the Court-fee payable does not depend on the market value but the juris-

1. (1960) 3 S.C.R. 713: (1962) 1 S.C.J. 274: (1962) 1 M.L.J. (S.C.) 127 : (1962) 1 An.W.R. (S.C.) 127: A.I.R. 1960 S.C. 1156.

*C.Misc. P.S.R.Nos. 47102 and 47103 of 1974. in S.A. Nos. 790 and 1247 of 1971 respectively.
5th December, 1974.

diction depended on the value for purposes of Court-fee still if any party wants to raise the question of valuation of the subject-matter of the suit at the appellate stage and if that valuation would affect the jurisdiction of the trial Court or the appellate Court, unless the party is liable to bring it within the exceptions provided under section 54 of the Act it will not be open to him to ask for a revaluation of the subject-matter.

[*Para.* 3.]

Inasmuch as Article 133 of the Constitution could not be fettered by any other provision, section 54 of the Court-fees and Suits Valuation Act, 1955, was not a bar for reconsidering the value of the subject-matter of the appeal for the purpose of appeal to the Supreme Court. But so far as Second Appeals are concerned, section 54 of the Tamil Nadu Court-fees and Suits Valuation Act, 1955, is applicable and the provisions of Order 1, rule 2 (5) (*c*) of the Appellate Side Rules does not in any way override that provision. Neither in express terms this rule is made to be operative irrespective of section 54 nor by implication it could be said that it has overriding effect.

[*Para.* 5.]

The right of the party to go behind the valuation adopted in the plaint or in the Memorandum of Appeal and to show the real value thereof will have to be decided as a question of fact in each case. The determination of this question will be governed by the ordinary procedure of the Court deciding, like *res judicata*, estoppel etc., and the rules of procedure and evidence which might, in certain cases, debar the pleadings and proving the true value.

Section 12 of the Court-fees and Suits Valuation Act, 1955 and Order 8, rule 2 of the Code of Civil Procedure require the party to raise the objection to the valuation even at the trial stage. If the party had not done it, as a plea which ought to have been raised, it shall be deemed to have been impliedly raised and overruled for the purposes of section 11 of the Code of Civil Procedure. Only in cases where there was no need for mentioning the market value of the subject-matter of the suit in the plaint, there would not have been any occasion for the defendant to plead the valuation and therefore the principles of *res judicata* would not apply.

[*Para.* 5.]

Cases referred to:—

Kuppanna v. *Peruma*, (1962) 1 M.L.J. 65 : I.L.R. (1961) Mad. 1143 : A.I.R. 1961 Mad. 511 (F.B.) ; *Official Trustee* v. *S.N. Chatterjee*, (1969) 2 S.C.J. 123 : (1969) 3 S.C.R. 92 : A.I.R. 1969 S.C. 823 ; *Kiran Singh* v. *Chaman Paswan*, (1954) 2 M.L.J. 60 : 1954 S.C.J. 514 : (1955) 1 S.C.R. 117 : A.I.R. 1956 S.C. 340 ; *Md. Maracair* v. *Veyanna Thevar*, I.L.R. (1954) Mad. 1116 : (1954) 1 M.L.J. 527 : A.I.R. 1954 Mad. 894.

Applications sought to be presented to the High Court under section 114 of the Civil Procedure Code for review of the Judgment of the High Court dated 4th July, 1974 and made in S. A. Nos. 790 and 1247 of 1971 respectively preferred to the High Court against the decree of the City Civil Court (Principal Judge) Madras in A. S. Nos. 270 and 47 of 1970 (O. S. Nos. 1517 of 1966 and 1611 of 1968 on the file of the City Civil Court (I Assistant Judge) Madras.

N. Sivamani for *E. R. Krishnan*, for Petitioner.

A. L. Somayajee for *M/s Aiyar* and *Dolia* and *R. Raveendran*, for Respondent.

The Court made the following

ORDER.—These two petitions have been filed for review of a judgment of this Court in S. A. Nos. 790 and 1247 of 1971 on the ground that the value of the subject-matter of the appeals is Rs. 20,000 and upwards and, therefore, ought to have been heard and decided by a Division Bench and could not have been dealt with by a Single Judge. The Office raised an objection as to the maintainability of these petitions on the ground that the values of the subject-matter of the appeals, as given in the trial Court, the lower appellate Court and in the second appeals, were for less than Rs. 20,000 and that it was not open now to question the said

valuations. The facts relevant for deciding the question may now be briefly stated. The petitioner in these petitions filed O. S. No. 1517 of 1966 for a declaration that he is the owner of the suit property which is an extent of 6 grounds and 355 sq. fit comprised in R. S. No. 174 of Nungambakkam village within the sub-registration district of T. Nagar and that the defendant has no title to the same. The plaintiff alleged that the property was purchased by him in the name of the defendant under a sale deed dated 6th May, 1941 and that, therefore, he is the real owner of the property. He also pleaded that he had been in possession and enjoyment of the same ever since the date of purchase. He had valued the relief at Rs. 800 under section 25 (*d*) of the Tamil Nadu Court-fees and Suits Valuation Act, 1955 and had paid a Court-fee of Rs. 60.50. The defendant in the suit, who is the respondent herein, filed O. S. No. 1611 praying for a decree directing the petitioner herein to hand over possession to her of the sale deed dated 6th May, 1941. This prayer was asked for on the basis that the suit property was purchased by her from and out of her own funds and that sometime after the death of her husband, the petitioner, who was residing with her, had stealthily removed the title deed from her possession. She valued the relief at one-fourth of Rs. 1,400 which is the sale consideration under the sale deed dated 6th May, 1941, and paid a Court-fee of Rs. 26.75 P. under section 24 (2) (*a*) of the Court-fees Act. The suits were jointly tried by consent of parties and the trial Court decreed O. S. No. 1517 of 1966 and dismissed O. S. No. 1611 of 1968. The respondent herein preferred two appeals in the Court of the Principal City Civil Judge, Madras. In these appeals, the values as given in the trial Court were adopted. The appeals were dismissed and the respondent preferred the above two second appeals, in which also she valued the reliefs as in the Courts below. As the valuations in these second appeals were far below Rs. 20,000 they were posted for final disposal in this Court. At the time of the hearing of these appeals, no objection was taken by either of the parties that the value of the subject-matter of the appeals is more than Rs. 20,000 and that they should be heard by a Division Bench. The second appeals were allowed and the suit, O.S. No. 1517 of 1966 was dismissed and the suit O. S. No. 1611 of 1968 was decreed. Thereafter, these petitions have been filed for review of the judgment on the ground that the market value of the suit property on the day when the appeals were heard and disposed of was more than Rs. 1,50,000 and that therefore, they should have been heard by a Division Bench.

2. Order 1, rule 2 (5) (*c*) of the Rules of the Appellate Side of the High Court reads as follows :—

> "*Order* I, *Rule* 2 : The following matters shall be heard and determined by a Bench of two Judges......
>
> (5) Every appeal......
>
> ....
>
> (*c*) from an appellate decree where the value of the subject-matter of the appeal is Rs. 20,000 or upwards ."

3. These rules were framed by the High Court under section 122 of the Code of Civil Procedure. Before dealing with the submissions of the learned counsel for the petitioner, it is necessary to note certain statutory provisions relating to the valuation of suits, appeals and second appeals for the purposes of jurisdiction and Court-fee, under the Tamil Nadu Court-fees and Suits Valuation Act, 1955. Under section 53 of the Act, in a suit as to whose value for the purpose of determining the jurisdiction of Courts specific provision is not otherwise made in the Act or in any other law, value for that purpose and value for the purpose of computing the fee payable under the Act shall be the same, and in a suit where fee is payable under the Act at a fixed rate, the value for the purpose of determining the jurisdiction of Courts shall be the market value or where it is not possible to estimate it at a money value such amount as the plaintiff shall state in the plaint. The suit O. S. No. 1517 of 1966 has been valued under section 25 (*d*) at Rs. 800. That will be the value for the purpose of jurisdiction under section 53 of the Act. In the other suit,

O. S. No. 1611 of 1958, the suit is valued under section 24 (2) (*a*) fixing the market value of the property at Rs. 1,400. Section 10 of the Act requires that in every suit in which the fee payable on the plaint depends on the market value of the subject-matter, the plaintiff shall file with the plaint a statement, in the prescribed form, of the particulars of the subject-matter of the suit and his valuation thereof. The plaintiff in O. S. No. 1611 of 1968, who is the respondent herein, has, in compliance with this provision, valued the property at Rs. 1,400.00. Section 12 (2) says that any defendant may, by his written statement, filed before the first hearing of the suit or before the evidence is recorded on the merits of the claim, plead that the subject-matter of the suit has not been properly valued or that the fee paid is not sufficient. The value of the appeal and the fee payable thereon would be the same as what would have been payable in the Court of the first instance on the subject-matter of the appeal. But, section 54 states that notwithstanding anything contained in section 99 of the Code of Civil Procedure, 1908, an objection that by reason of the over-valuation or under-valuation of a suit or appeal, a Court of first instance or lower appellate Court which had not jurisdiction with respect to the suit or appeal exercised jurisdiction with respect thereto, shall not be entertained by an appellate Court, unless the objection was taken in the Court of first instance at or before the hearing at which issues were first framed and recorded, or in the lower appellate Court in the memorandum of appeal to that Court, or the appellate Court is satisfied, for reasons to be recorded by it in writing, that the suit or appeal was over-valued or under-valued and that the over-valuation or under-valuation thereof has prejudicially affected the disposal of the suit or appeal on its merits. These provisions clearly establish that in a suit where the Court-fee payable depends on the market value of the suit property and if the defendant questions the valuation on the ground that the suit property had been under-valued and if it had been properly valued, it would affect the jurisdiction of the trial Court, he ought to take that objection even at the stage of his filing a written statement and, if he had not questioned the same, after the disposal of the suit, he could not take up that plea in the appellate stage unless he satisfies the two exceptions provided under section 54 itself. As already stated, in O. S. No. 1611 of 1968, the Court-fee payable depended on the market value of the suit property and the defendant, who is the petitioner herein, never disputed the valuation given by the respondent-plaintiff. Even at the time of the hearing of the appeals he did not question the valuation. It was not the case of the petitioner that he would come within the exceptions provided under section 54 of the Act. Therefore, clearly, it was not open to the petitioner, to raise this question of under-valuation, even if true which is not accepted at the time of hearing of the second appeals and *a fortiori* after disposal of the second appeals.

3. Even if the Court-fee payable does not depend on market value but the jurisdiction depended on the value for purposes of Court-fee still if any party wants to raise the question of valuation of the subject-matter of the suit at the appellate stage and if that valuation would affect the jurisdiction of the trial Court or the Appellate Court, unless the party, is liable to bring it within the exceptions provided under section 54 of the Act it will not be open to him to ask for a revaluation of the subject-matter. Therefore both on the ground that the market value was mentioned in O. S. No. 1611 of 1968 but had not been disputed by the petitioner herein in his written statement and also by virtue of the provisions of section 54 of the Court-fees Act, it would not have been open to the petitioner even at the time when the second appeal was taken up for hearing to ask for a revaluation of the subject-matter of the suit, which would affect the jurisdiction of the trial Court and the lower appellate Court and much more so after the second appeals were disposed of.

4. But, the learned counsel for the petitioner contended that inspite of the provision in section 54, it was open to him, to raise the question of valuation as, under Order 1, rule 2 (5) (*c*) of the Ap-

pellate Side Rules of this Court, when the value of the subject-matter of the appeal is Rs. 20,000 or upwards, it shall have to be heard and determined by a Bench of two Judges. He referred, in this connection to the language used, namely, "the value of the subject-matter of the appeal" and stated that it is similar to the language used in Article 133 of the Constitution of India prior to its recent amendment and section 110 of the Code of Civil Procedure and that he could raise this question of valuation at the stage of hearing of the second appeal or after the disposal of the same. He also relied on a Full Bench decision of this Court in *Kuppanna* v. *Peruma*[1] .In that case, the suit was valued by the plaintiffs at Rs.9,650. The suit was decreed by the trial Court. When the defendants filed the appeal to the High Court, they adopted, that value for the purpose of payment of the Court-fee. After the second appeal was dismissed, a petition for leave to appeal to the Supreme Court under Article 133 of the Constitution was filed. In that petition the defendants contended that the value of the subject-matter of the suit, given by the plaintiffs and adopted by the defendants in the appeals, was erroneous and that the real value of the property was and continued, at all times to be more than Rs. 20,000 and that, therefore, he could prefer an appeal to the Supreme Court. The question that was referred for the opinion of the Full Bench was 'whether, for ascertaining the value of the subject-matter in dispute for the purpose of Article 133 of the Constitution and section 110, Civil Procedure Code, in the Court of the first instance or in the proposed appeal, it would be open to any party, be he the plaintiff or the defendant, to go behind the valuation adopted in the plaint or in the memorandum of appeal as the case may be and show the real value thereof'.

The Full Bench answered the reference in the following manner:

> " It would be open to any party, be he the plaintiff of the defendant, to go behind the valuation adopted in the plaint or in the memorandum of appeal, as the case may be, and show the real value of the subject-matter in dispute, except where (1) there has been a judicial adjudication of the correctness of the original valuation in such a way as to attract the principle or the rule of *res judicata* or (2) where the party making the original valuation or the one adopting it had an option to give that value or the correct value and while exercising the option by giving one of such values, he gained for himself an advantage or made the opposite party suffer a detriment."

5. The decision in the Full Bench related to an application under Article 133 of the Constitution and the language used under the Article. The learned Judges proceeded to consider the question of his right to revaluation because that question will have to be considered only in the light of Article 133 of the Constitution and section 110. The learned Judges felt that the right of appeal to the Supreme Court is a constitutional right and cannot be impaired or affected by an erroneous statement as to the value of the subject-matter by the party where such statement is made deliberately or otherwise. In view of the fact that Article 133 of the Constitution could not be fettered by any other provision, section 54 of the Court-fees and Suits Valuation Act, 1955 was not a bar for reconsidering the value of the subject-matter of the appeal for the purpose of appeal to the Supreme Court. But so far as the second appeals are concerned, section 54 is applicable and the provision in Order 1, rule 2 (5) (*c*) of the Appellate Side Rules does not in any way override that provision. Neither in express terms this rule is made to be operative irrespective of section 54 nor by implication it could be said that it has overriding effect. Therefore it would not have been open to the petitioner even at the time of the final hearing of the second appeal to have questioned the valuation of the subject-matter unless he satisfied the conditions under section 54. Subsequent to the disposal of the second appeal he could question the valuation only for the purpose of taking further proceedings in the Supreme Court and not to re-open or have the decree passed already set aside. Even for taking further proceedings he would have to

1. (1962) 1 M.L.J. 65 : 74 L.W. 460 : I.L.R. (1961) Mad. 1143 : A.I.R. 1961 Mad. 511 (F.B.).

establish that he was not debarred from reagitating the value of the subject-matter by any other rules of procedure or evidence. That was what was held by the Full Bench in *Kuppanna* v. *Peruma*[1]. It would be seen from a discussion in the judgment that the right of a party to go behind the valuation adopted in the plaint or in the memorandum of appeal and to show the real value thereof will have to be decided as a question of fact in each case. The determination of this question will be governed by the ordinary procedure of the Court deciding, like *res judicata*, estoppel etc., and the rules of procedure and evidence which might, in certain cases, debar the pleading and proving of the value. The Full Bench also held that if, by adopting the real value, the jurisdiction of the trial Court would be affected and it would involve a change of forum of the suit or the appeal, the defendant ought to have raised that objection to valuation even when he filed the written statement. That was plainly required of him under section 12 of the Court-fees and Suits Valuation Act, 1955, and Order 8, rule 2 of the Code of Civil Procedure. If he had not done that, as a plea which ought to have been raised, it shall be deemed to have been impliedly raised and overruled for the purposes of section 11 of the Code of Civil Procedure. In the instant case, if the value of the subject-matter of the appeal was Rs. 1,50,000 as contended by the petitioner herein, the City Civil Court would have had no jurisdiction to try the suit and the Principal City Civil Judge also could not have entertained the appeal. The suit should have been filed on the Original Side of the High Court. Since the correct valuation would have involved a change of the forum, the petitioner ought to have raised this contention in his written statement. He having failed, it is not open to him now to raise that plea. It shall be deemed to be an implied finding against him, which will amount to *res judicata*. Only in a case where there was no need for mentioning the market value of the subject-matter of the suit in the plaint, thare would not have been any occasion for the defendant to plead the valuation and therefore the principle of *res judicata* would not apply. But the petitioner could still be barred from raising this question on the ground of estoppel or election. Since in the suit, O.S.No.1611 of 1968, the plaintiff was bound to give the market value of the subject-matter of the suit and he did give the value of Rs. 1,400.00 the defendant had a choice between two alternative courses, one accepting the valuation given by the plaintiff and the other of disputing the same if he wanted to contend that the Court had no jurisdiction because of under-valuation. By not disputing the valuation, the defendant shall be deemed to have elected to accept the valuation given by the plaintiff and thereby derived the advantage of a trial by that Court in which the suit was filed. The defendant would have got a right of appeal on that valuation to the Principal City Civil Judge and a further appeal to this Court. It was not open to the petitioner to take advantage of the valuation given by the plaintiff when it suited him and then to contend that the original valuation was not correct. This was also the principle that was settled by the Full Bench. Therefore, far from supporting the contention of the learned counsel for the petitioner, the Full Bench decision is clearly against his submissions.

6. It was next contended by the learned counsel that Order I, rule 2 (5) (*c*) of the Appellate Side Rules is a matter of jurisdiction of this Court and if any decision was rendered in a matter in which it had no pecuniary jurisdiction it would be without jurisdiction and therefore null and void. In this connection, the learned counsel relied on the decision in *Official Trustee v. S.N. Chatterjee*[1]. The Supreme Court in this decision held that an order made by the High Court in a matter not covered by section 34 of the Indian Trust Act, was with-out jurisdiction. But it has been held by the Supreme Court in *Kiran Singh* v. *Chaman Paswan*[2], that over-valuation or under-valuation is not to be treated as a jurisdictional matter. In that case, though the correct valuation of the subject-matter would not have changed the forum for the trial of the suit, on a question of appellate forum there was a diffe-

1. (1962) 1 M.L.J. 65 : A.I.R. 1961 Mad. 511.

1. (1969) 2 S.C.J. 123 : (1969) 3 S.C.R. 92 : A.I.R. 1969 S.C. 823.
2. (1954) 2 M.L.J. 60 : 1954 S.C.J. 514 : (1955) 1 S.C.R. 117 : A.I.R. 1954 S.C. 340.

rence. If the original valuation as given in the plaint was accepted, an appeal would lie to the District Court and if it had been correctly valued, it would lie only to the High Court. Against the decision rendered in the appeal by the District Court a second appeal was preferred and in that the Plaintiff for the first time, took up an objection that on the correct valuation of the subject-matter the District Court could not have entertained an appeal and therefore the High Court should treat the judgment of the District Court in the appeal as a nullity and hear the second appeal as if it were a first appeal without any limitations as to the points that could be determined. It was held by the High Court that the appeal to the District Court was competent and that its decision could be reversed only if the appellant could establish prejudice on the merits and holding that on a consideration of the evidence no such prejudice had been shown, the second appeal was dismissed. The plaintiff preferred an appeal to the Supreme Court. The question for consideration was " what the position in law is when a Court entertains a suit or an appeal over which it has no jurisdiction and what the effect of section 11 of the Suits Valuation Act is on that position." Section 11 of the Suits Valuation Act, 1887 corresponds to section 54 of the Court-fees and Suits Valuation Act, 1955. Confirming the judgment of the High Court, the Supreme Court held :

" The drafting of the section has come in and deservedly for considerable criticism ; but amidst much that is obscure and confused, there is one principle which stands out clear and conspicuous. It is that a decree passed by a Court, which would have had no jurisdiction to hear a suit or appeal but for over-valuation or under-valuation, is not to be treated as, what it would be but for the section, null and void, and that an objection to jurisdiction based on over-valuation or under-valuation, should be dealt with under that section and not otherwise. The reference to section 578, now section 99, Civil Procedure Code, in the opening words of the section is significant. That section, while providing that no decree shall be reversed or varied in appeal on account of the defects mentioned therein when they do not affect the merits of the case, excepts from its operation defects of jurisdiction. Section 99 therefore gives no protection to decrees passed on merits, when the Courts which passed them lacked jurisdiction as a result of over-valuation or under-valuation. It is with a view to avoid this result that section 11 was enacted. It provides that objections to the jurisdiction of a Court based on over-valuation or under valuation shall not be entertained by an appellate Court except in the manner and to the extent mentioned in the section. It is a self-contained provision complete in itself, and no objection to jurisdiction based on over-valuation or under valuation can be raised otherwise than in accordance with it. With reference to objections relating to territorial jurisdiction, section 21 of the Civil Procedure Code enacts that no objection to the place of suing should be allowed by an appellate or revisional Court, unless there was a consequent failure of justice. It is the same principle that has been adopted in section 11 of the Suits Valuation Act with reference to pecuniary jurisdiction. The policy underlying sections 21 and 99, Civil Procedure Code and section 11 of the Suits Valuation Act is the same, namely, that when a case had been tried by a Court on the merits and judgment rendered, it should not be liable to be reversed purely on technical grounds, unless it had resulted in failure of justice, and the policy of the legislature has been to treat objections to jurisdiction both territorial and pecuniary as technical and not open to consideration by an appellate Court, unless there has been a prejudice on the merits."

7. Therefore, even on this ground the learned counsel is not entitled to ask for a revaluation of the subject-matter for the purpose of review. The learned counsel also relied on the decision of this Court in *Mohamed Maracair* v. *Veyanna Thevar*[1]. That was a case where no

1. I.L.R. (1954) Mad. 1116 : (1954) 1 M.L.J. 527 : A.I.R. 1954 Mad. 894.

question of valuation was involved but on the valuation as given in the appeal, it could not have been dealt with by a single judge but while disposing of a petition to furnish security, the learned single Judge dismissed the appeal itself. It was held that on the valuation given in the appeal it could not have been dealt with by a single Judge and that therefore the order made by him is liable to be set aside and the appeal to be heard on merits again. In this case, as already stated, as per the valuation given in the second appeal, it would have to go only before a single Judge and having taken a decision it is not open to any party to question the same on the ground that the value of the subject-matter was Rs.20,000 or upwards.

8. In the result, I hold that it is not open to the petitioner to ask for a revaluation of the subject-matter of the appeal for the purpose of review.

R. S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(In Insolvency.)

PRESENT :—*S. Mohan, J.*

In the matter of S. A. Manicka Mudaliar and Company by its Partners 1 S. A. Manicka Mudaliar and 2 M. Arunachalam .. *Insolvents.*

The Official Assignee, Madras .. *Applicant**

v.

S. P. Kannappa Mudaliar (deceased) by Bagiammal, legal representative brought on record as per the order dated 6-1-75 in Application No. 720 of 1974 .. *Respondent.*

Presidency Towns Insolvency Act (III of 1909), section 56—Insolvent—Power of attorney in his favour by his sister to purchase or sell properties, to borrow and lend money and to execute necessary documents in that regard—Sister entrusting money to him—Repayment if fraudulent preference—Principal and Agent—Money entrusted to agent—Specific purpose—Investing in money lending tranactions—Nature of relationship—Trustee and Beneficiary—Express Trust—Limitation Act not applicable.

It is well established that a person occupying a fiduciary relation, who had property deposited with him on the strength of such relation, is to be dealt with as an express and not merely a constructive trustee of such property. His possession of such property is never in virtue of any right of his own, but is coloured from the first by the trust and confidence in virtue of which he received it. He never can discharge himself except by restoring the property which he never had held otherwise than upon this confidence, and this confidence or trust imposes on him the liability of an express or direct trustee. [*Para.* 5.]

In the case of express trust the plea of bar under statute of limitation cannot prevail. [*Para.* 5.]

Where moneys entrusted by a sister to her brother for doing money-lending business were taken back by her later, the fact that fifteen days after the taking back, the brother applied to be adjudicated as insolvent and was so adjudicated does not constitute preference, inasmuch as in the circumstances of the case, the transaction between the sister and the brother (insolvent) was in the nature of a trust. [*Para.* 8.]

Cases referred to :—

Burdick v. *Garrick* (V Ch. App. 233); *Kerewich North American Land and Timber Company Limited* v. *Watkins*, (1904) 1 Ch.D. 242; *Soar* v. *Ashwell*, (1893) 2 Q.B. 390; *Friend* v. *Young*, (1897) 2 Ch. 421; *Murugappa* v. *Kumaranadaswami*, 35 L.W. 150: 62 M.L.J. 281: I.L.R. 55 Mad. 541: A.I.R. 1932 Mad. 247.

M.S. Venkatarama Iyer, for Respondent.

The Court delivered the following

JUDGMENT :—The following facts required to be noted for a proper appreciation of the issue involved in this matter. On 24th September, 1957 the respondent herein executed a general power of attorney in favour of the insolvent (Manicka Mudaliar) wherein one of the powers that is given is, to the purchase or sell the properties, to borrow and to lend and to execute necessary document in that regard.

2. On 21st December, 1967 the respondent herein lent a sum of Rs.25,000 to

* Petition No. 69 of 1972 and Application No.629 of 1974. 19*th March*, 1975.

the insolvent which was repaid to her on the 12th of July, 1972 and on the 27th July, 1972 the debtor (Manicka Mudaliar) filed a petition for adjudication and the actual order of adjudication is dated the 28th July, 1972. Under these circumstances, it is contended by the learned Official Assignee that this payment just 15 or 16 days prior to the actual order of adjudication would amount to fraudlent preference within section 56 of the Presidency Towns Insolvency Act and is therefore liable to be set aside. In the counter-statement by way of reply to the report of the Official Assignee, it is stated that inasmuch as the power of attorney had been executed on the 24th September, 1957 the relationship is that of an agent and principal. Where the agent is entrusted specifically with the moneys to lend them to 3rd parties on money-lending transactions the relationship becomes that of a trustee and beneficiary and consequently there cannot be a debt much less when that amount is repaid there is no question of "with a view to prefer" as required under section 56 of the Act.

3. The question that arises for my determination is, where the moneys belonging to the principal are entrusted to the agent for the specific purpose of investing it in money-lending transactions, could it be said that the relationship is that of trustee and beneficiary or merely that of an agent under the principal alone. I may first refer to the leading case in *Burdick* v. *Garrick*[1], wherein the facts are more or less similar. The agent who was a solicitor in London, held a power of attorney from his principal in America to sell his poperty and invest the proceeds in his name. The agent received certain moneys under the power and paid them into his own bankers to the general account of his firm. The principal died in 1859 intestate. In 1867 his widow took out administration to his estate, and in 1898 she filed a bill against the agent for an account. It was held :

> " A mere banker who takes charge of his customer's money is not in any fiduciary relation whatever to him with respect to the particular coins or notes deposited, because it is ordinary course of trade to make use of them for his own profit. He does make use of them, and he invests the money deposited with him, and his customer does not require from him those very coins or exchequer bills which he deposited with him. But in the present case we have an agent who is entrusted with those funds, not for the purpose of being remitted when received to the principal, but for the purpose of being employed in a particular manner, in the purchase of land or stock ; and which moneys the factor or agent is bound to keep totally distinct and separate from his own money ; and in no way whatever to deal with or make use of them. How a person who is entrusted with funds under such circumstance differs from one in an ordinary fiduciary position I am unable to see".

1. V Chancery Appeals 233.

4. The next case to which reference could be made is *Kerswich North American Land and Timber Company, Ltd.* v. *Watkins*[1].

5. In that case it was held thus :

> " Of the other authorities cited the only one which I think it necessary to notice is *Soar* v. *Ashwell*[2]. Of this case Stirling, J., in *Friend* v. *Young*[3], remarked that the plaintiffs' claim was of such a nature as could only be asserted in a Court of Equity, and that this was pointed out by Lord Esher, M.R., in the commencement of his judgment. The Master of the Rolls certainly did this, and there are other passages in his judgment which show that he was throughout determining how a Court of Equity would treat that claim ; but I cannot think that the Master of the Rolls could have intended to mean more than that the case was one of trustee and *cestui que trust* to be decided according to the principles guiding the Court, which ordinarily takes cognizance of that relation. In the concluding sentence of his judgment, he says that he is clearly convinced by the evidence that the defendant became, on receipt of the money, a trustee of it. I conceive the point of Stirling, J's, remark to be that he himself in *Friend* v. *Young*[3], was not dealing with a

1. (1904) 1 Ch. D. 242.
2. (1893) 2 Q.B. 390.
3. (1897) 2 Ch. 421.

case of that character but with one quite different, involving fiduciary relation, but not that of trustee and *cestui que trust*, and which might therefore properly be the subject of a common law action. On the point that the case of *Soar* v. *Ashwell*[1] was one of trustee and *cestui que trust*, and therefore outside the Statute of Limitations, the judgment of Bowen, L.J is perfectly clear. Like the Master of the Rolls, he relies on *Burdick* v. *Garrick*[2], but before referring to that case he says :

"It has been established beyond doubt by authority binding on this Court that a person occupying a fiduciary relation, who has property deposited with him on the strength of such relation, is to be dealt with as an express, and not merely a constructive, trustee of such property. His possession of such property is never in virtue of any right of his own, but is coloured from the first by the trust and confidence in virtue of which he received it. He never can discharge himself except by restoring the property which he never has held otherwise than upon this confidence, and this confidence or trust imposes on him the liability of an express or direct trustee." These authorities, altogether consistent with others to which I have not thought it worth while here to refer, lead inevitably to the conclusion that in this case an express trust was constituted as between the plaintiffs and defendant, and that as regards the moneys remitted by the former to the latter for investment the plea of the Statute of Limitations cannot prevail. "

6. It is interesting to note that this decision in *Burdick* v. *Garrick*[2], has been followed by a Division Bench of this Court as seen from the decision in *Murugappa* v. *Kumaranadaswami*[3], wherein the facts were: P. being the founder and head of a certain mutt, and with a view create an endowment for that mutt, collected subscriptions from several persons and the amounts so collected were paid to the makers of four hundies in favour of P.P. endorsed those four hundies to *R.* with instructions to him to realize the amount thereof and to invest the amount so collected on P's behalf and on account with a firm N. R. however put the money into his own account in the firm and not to the credit of P.P. thereupon brought a suit against firm N. for recovery of the amount realized and standing in the account of R. Under those circumstances it was held :

" The money was entrusted to Ramanathan Chetty for that purpose and in putting the money into his own account he was guilty of a breach of trust and any difficulty there might have been in identifying this money after it got into the hands of defendant 1 is removed by reason of the fact that Ramanathan Chetty had two accounts with defendant 1, *viz.*, a tavanai account and a tanathu account. The latter was an account of Ramanathan Chetty's own dealings".

7. Instead of multiplying the authorities I need only to refer to the illuminating passage occurring in page 214 of G.W. Keeton the Law of Trusts, 9th edition :

" The question whether an agent is a trustee for his principal has provoked considerable discussion. It is certainly clear that an agent cannot make a profit out of his position as agent, and if he does, he is accountable for that profit to his employer. Unless there is some evidence of a fiduciary relationship, however, the position of the parties in respect of the profit unlawfully made is that of debtor and creditor, and not that of trustee and *cestui que trust*. It has been suggested also that an agent is always a constructive trustee of property of the principal, committed to his charge, but the better view would seem to be that he is only a trustee where there is some special, confidential relationship, *e.g.*, where the principal gives the agent property for safe custody, sale or investment, but where there is no such specially confidential relationship, there is no relationship of trustee and beneficiary, and the principal's remedy is at Common Law for money had and received."

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1. (1893) 2 Q.B. 390.
2. L.R. 5 Ch. App. 233.
3. 35 L.W. 150 : 62 M.L.J. 281 : I.L.R. 55 Mad. 541 : A.I.R. 1932 Mad. 247.

8. From the facts of this case it is clear that the respondent in view of the confidence and the relationship as her brother came to entrust the money. According to her the moneys were specifically entrusted for the purpose of doing money-lending businesss to 3rd parties and in cross-examination she adds as to the reason why she took back the same with interest. According to her since her brother (Insolvent) had the advantage of her money lending it to the 3rd parties she demanded interest which was repaid to her on 12th July, 1972 after much insistence over which a quarrel also ensued.

9. Mr. M.S. Venkatarama Iyer, is right in his submission when he says that where there was a duty on the part of the trustee to invest by lending it to the 3rd parties, but he merely looked after his own self-interest, the self-interest must be put aside. This has been eloquently put by Dr. Waters as follows:

> " All agents, it is submitted, are by the nature of their function obligated to put self-interest aside when acting within the scope of their agency or otherwise utilising their office in any particular. The concomitant of this obligation is breached and proprietary advantage ensues. It is for the instant Court to decide whether the particular principal has not imposed the full gamut of this obligation. "

The learned Official Assignee would argue that there is nothing on record to show that there was any entrustment pertaining to the power-of-attorney executed on 24th September, 1957. On a reading of the power-of-attorney it shows that there were prior transactions and the specific power was conferred to lend or borrow money and to execute documents in that regard. Exhibits R-2 to R-5 are various mortgage deeds executed by third parties in favour of the respondent Bagyammal represented by the insolvent the power-of-attorney agent. Therefore this argument fails.

10. The result is this application will stand dismissed. However, there will be no order as to costs.

R.S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—*M. M. Ismail, J.*

The Management of Crompton Engineering Company (Madras) Private Limited, Madras-1 .. *Petitioner**

v.

The Presiding Officer, Additional Labour Court, Madras and others .. *Respondents.*

Industrial Disputes Act (XIV of 1947), *section* 2 (s)—*Workmen—Employment for a specified period—Expiry of period—Workman whether entitled to reinstatement.*

Essentially, an order of reinstatement postulates the existence of a post in which the particular person was working and with reference to which his employment was terminated. When there was no post and there was no termination of employment, but only there was the employment of a particular individual for a specific period or for a specific work, the employment automatically came to an end on the expiry of such period or after the work was over, and consequently, there was no termination and there was no question of reinstatement.

[*Paras.* 6 *and* 7.]

Case referred to :—

Elumalai v. *Management of Simplex Concrete Piles*, (1970) 2 L.L.J. 454.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in I. D. No. 155 of 1968 on the file of the Additional Labour Court, Madras and quash its Award, dated 5th December, 1970 published in Supplement to Part II, section I of the Tamil Nadu Government Gazette, dated 30th December, 1970 and printed at pages 11 to 13 thereof.

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* W.P. No. 2558 of 1971. *21st February,* 1974.

M. R. Narayanaswamy, for Petitioner.

S. Ramalingam, Assistant Government Pleader and *P. K. Gopalraj*, for Respondents.

The Court made the following

ORDER.—This is a petition to quash the award of the Labour Court, Madras dated 5th December, 1970 made in I. D. No. 155 of 1968. Most of the facts are not in controversy.

2. The petitioner, the Cromption Engineering Company (Madras) Private Limited, had employed the respondents 2 to 4 herein temporarily for a specific period or in respect of a particular contract work undertaken by the petitioner. The three persons had been employed for several such periods and for several such contracts. Exhibits M-1 and M-4 which are the orders of appointment in respect of W. W. 1 and W. W. 3 show that they were appointed in respect of the particular contract or for particular period and their appointments were purely temporary and came to an end as soon as the period or the job was over. The respondents 2 to 4 herein raised an industrial dispute on the allegation that they were not given any work with effect from a particular date. That dispute was referred for adjudication by the Government in G. O. R. No. 2578 dated 22nd November, 1968. The points of reference were :—

> " Whether the non-employment of Thiruvalargal D. Dhansingh, P. K. Gopal Pillai and A. Divyanathan, was justified if not, to what relief they are entitled; To compute the relief, if any awarded, in terms of money, if it can be so computed."

3. The petitioner contended before the Labour Court that the petitioner has a contract department in which it employed on permanent basis wiremen, assistant wiremen, supervisors and helpers, who are the principal type of employees in the contracts department, and as and when the company takes extra work or for completing job quickly ahead of the schedule, it used to employ casual workers to help the permanent workers ; the respondents 2 to 4 herein were all employed purely on casual basis and daily rates, and the contract of service was for the day only ; no payment was made for Sundays or other holidays ; while the permanent employees had the benefit of a graded scale of basic wages and separate dearness allowance, respondents 2 to 4 were purely casual employees and were paid only on consolidated basis ; they were not entitled to any leave or other privileges available to permanent workers; in short, the service conditions of respondents 2 to 4 varied widely from those of the permanent employees themselves in that very department ; even during the period they were taken on casual employment, there have been a number of occasions when there has been break in the period of employment; they had not worked fully during the entire week on a number of occasions.

4. The Labour Court has proceeded on the basis that there was some difficulty in holding that respondents 2 to 4 herein were permanent employees of the company, and the company had separate muster rolls for permanent labourers and the benefits that are available to the permanent labourers were not given to these workmen. It is not disputed that respondents 2 to 4 herein were paid only daily rates of wages and they were paid at the end of the week on Saturdays, and they were paid only on the days when they had worked, and they were not entitled to wages on days on which they did not work and they were not entitled to any holidays. Notwithstanding these facts, the Labour Court simply on the basis of the judgment of this Court in *Elumlai* v. *Management of Simplex Concrete Piles*[1], came to the conclusion that even casual labourers are included in the definition of 'workmen' in section 2 (*s*) of the Industrial Disputes Act, and therefore the respondents 2 to 4 herein were entitled to reinstatement. In my opinion, the Labour Court committed an error in coming to this conclusion. In the decision referred to above, the only question that was considered by this Court was whether a casual worker will come within the expression ' workman ' occurring in section 2 (*s*) of the Industrial

1. (1970) 2 L.L.J. 454.

Disputes Act. In that case, the Labour Court held that the casual labourers were not workmen and on that basis, the claim petition filed by the casual labourers was dismissed. When the matter came up before this Court, this Court held that the definition of the term 'workman' found in section 2 (*s*) of the Act would include a casual worker also, and on this finding remanded the matter back to the Labour Court for fresh consideration. However, while doing so, this Court clearly pointed out that that this Court was not deciding anything as to whether the petitioner therein was entitled to any relief under any of the provisions of the Industrial Disputes Act or not, and all that the Court decided was that the petitioner therein was a workman within the scope of the definition of the word in section 2 (*s*) of the Act.

5. The Labour Court in the present case has thoroughly misunderstood the scope of the above decision. As I pointed out already, in view of the above decision, respondents 2 to 4 herein would all be within the scope of the definition 'workman' in section 2 (*s*) of the Act. But that is far different from saying that respondents 2 to 4 herein would be entitled to a particular relief provided for in the Act. However, the Labour Court recorded in paragraph 7 of its award :

> " Now on going through the entire records in this case although there is some difficulty in holding that W. W. 1 to W. W. 3 are permanent employees of the respondent company, still the matter assumes little importance in view of the decision in *Elumalai* v. *Management of Simplex Concrete Piles and another*[1]. It has been held in this ruling that the definition of worker in section 2 (*s*) is in the widest possible terms and includes a casual worker. Further, it is clear from section 25-C that even a casual worker would be a worker within the meaning of section 2 (*s*) of the Industrial Disputes Act. Therefore even assuming that the workmen are merely casual workers, still they would be workmen within the meaning of section 2 (*s*) of the Industrial Disputes Act, and they would be entitled to the reliefs claimed by them."

Solely from the simple fact that the definition of the term 'workman' contained in section 2 (*s*) of the Act includes temporary or casual labourers also, it does not follow that such temporary or casual labourers are entitled to reinstatement.

6. As I pointed out already, the reference that was made to the Labour Court was whether the non-employment of respondents 2 to 4 herein was justified or not. In my opinion ,the question of non-employment will arise only when the employer refused to give work to a person who is entitled to work. In this particular case, in the case of respondents 2 to 4, they were appointed only for a specific period or for a particular work and as soon as the period was over or the work was over, their employment automatically came to an end and there is no rule or law which contemplates that such an employee must be given work again by the employer. In this particular case, even the Labour Court was fully aware of this position. Though it directed reinstatement of respondents 2 to 4 herein, it declined to order payment of backwages to them. In paragraph 14 of the award, the Labour Court stated that there was evidence to show that the contract in which these workmen were employed was over and that the company had got other contracts for which the services of these workmen were not immediately needed. Therefore, it is clear that even the Labour Court accepted the position that the respondents 2 to 4 herein were employed for a particular contract, and after the completion of that contract even when the petitioner took some other contract, the services of respondents 2 to 4 were not needed for that contract. If so, it is difficult to understand how respondents 2 to 4 can be directed to be reinstated. Essentially, an order of reinstatement postulates the existence of a post in which the particular person was working and with reference to which his employment was terminated. When there was no post and there was no termination of employment, but only there was the employment of a particular individual for a specific period or for a specific work, the

1. (1970) 2 L.L.J. 454.

employment automatically came to an end on the expiry, of such period or after the work was over, and consequently, there was no termination and there was no question of reinstatement. The result of this is that the Labour Court on an erroneous understanding of the scope of the judgment of this Court referred to already, straightaway held that notwithstanding the facts of the present case, the respondents 2 to 4 were entitled to be reinstated in the employment of the petitioner herein.

7. Learned counsel for respondents 2 to 4 repeatedly contended before me that respondents 2 to 4 had been engaged for a fairly long time and that is the finding of the Labour Court and in view of this, the Labour Court was justified in directing the reinstatement. No principle or provision of law was brought to my notice to show that a worker who was employed for a specific period or a specific work and whose employment automatically came to an end on the expiry of the period or completion of the work is entitled to reinstatement simply because he was so employed on more than one such occasion and so he worked in that manner for a long period and no case of retrenchment was pleaded either before the Labour Court or before me. In paragraph 9 of the award, the Labour Court dealt with the case of W. W. 1 that is the third respondent herein, and with reference to him, it pointed out that though he was appointed as a workman under Exhibit M-1 on a salary of Rs. 3 50 per day on a temporary basis, he had stated in his evidence that he had been in service from 22nd June, 1966 onwards and that he was removed from service only on 5th February, 1968 and the muster roll produced in this case as per Exhibit M-2 would show that he was in the service of the company from 10th July, 1966 to 16th July, 1966 and Exhibit M-10 showed that he was appointed on 6th June, 1967 and for a period of nearly seven months he was in service for about 157½ days. Hence the Labour Court concluded that it cannot be stated that he was only a casual labourer and worked only for a few days. With regard to W. W. 2, that is respondent 2 herein, the Labour Court pointed out that according to him, he worked from 5th January, 1962 and his name finds a place in Exhibit M-3 for the period 10th July, 1966 to 16th July, 1966 and in his favour, a wage card was maintained by the site engineer as per Exhibit M-8 and he was stopped from service from 2nd January, 1968. The Labour Court concluded :—

> "Therefore on a perusal of these documents it is clear that W W. 2 was in service for a period of nearly six years though only some of the documents relating to the job were filed by the management."

The documents that were referred to in paragraph 10 of the award in which alone the case W. W. 2 was dealt with, were Exhibits M-3 and M-8 and these two documents admittedly do not establish that W. W. 2 was in service for a period of nearly six years. When this was realised, the learned counsel for respondents 2 to 4 contended that even though the Labour Court was wrong in stating that these documents established that W. W. 2 was in service for nearly a period of six years, still there was oral evidence to support this conclusion of the Labour Court. In my opinion this contention is untenable. As far as W. W. 3, that is, respondent 4 is concerned, his case was dealt within paragraph 11 of the award and in that paragraph, the Labour Court held that he has worked for one year under Exhibit M-9 and during the course of 1967, he has worked for 280 days and hence he cannot also be treated as a casual labourer though the company had not chosen to treat him as a permanent labourer. Here also, the Labour Court observed that W. W. 3 has stated that he was working as an electrician-helper from 4th January, 1966 and that he was dismissed from service from January, 1968. I may point out immediately that there is no order terminating the services of any of these respondents and even though respondents 2 to 4 stated in their evidence that their services were terminated or they were dismissed from service, there was no order to that effect, and on the other hand, as I pointed out already, the very orders of appointment themselves show that they were appointed only for

a particular period or for a particular job and as soon as the period or the job was over, the appointment automatically came to an end and this position was not disputed before me.

8. Under these circumstances, even though the respondents 2 to 4 would come within the scope of the term 'workman' in section 2 (s) of the Industrial Disputes Act, they would not be entitled to reinstatement as ordered by the Labour Court since there was no question of termination of their services or discharge of the workmen concerned as their employment itself was for a particular period or for a particular job and such employment came to an end automatically as soon as the term was over or the job was over. Under these circumstances, the award of the Labour Court in the present case cannot be sustained. Consequently, the Writ Petition is allowed and the impugned award is quashed. There will be no order as to costs.

S.J. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Natarajan, J.*

A. Sahadevan .. *Appellant**

v.

M. Muthuraj in his capacity as the Auditor of the Kilchettipattu Panchayat Board .. *Respondent.*

and

P. Doraiswami Naicker .. *Appellant*

v.

The Revenue Divisional Officer (Auditor), Ranipet .. *Respondent.*

Madras Panchayats Act (XXXV of 1958), *sections* 165, 173 *and* 178 *and rule* 6 (1) (a) *of the Surcharge and Disallowance Rules framed under section* 178—*President of Panchayat surcharged—Amount drawn and collected from Panchayat by President—Entire amount not spent—Failure to remit balance—Surcharge order passed beyond three years—Whether barred by limitation—Interpretation of statutes—Conflict between sections of the Act and Rules—Harmonious construction preferred.*

Section 165 of the Madras Panchayats Act refers to distraint proceedings, suits and prosecutions taken on behalf of the Panchayat or the Panchayat Union Council in respect of any tax or other sum due under the Act or any Rule or bye law, regulation or order made under it. The section cannot obviously have reference to the liab'lity of the President, the Executive Authority and Member of a Panchayat or the Chairman, Commissioner, and Member of Panchayat Union Council for the loss, waste or misapplication of any money or other property owned by or vested in the Panchayat or Panchayat Union Council as a consequence of his neglect or misconduct. For a liability of the latter kind, section 173 has been specifically enacted. Clearly therefore, section 165 can have reference only to tax or other sums due to a Panchayat or a Panchayat Union Council from third parties, and not to compensation amounts the officers of a local body have to pay for the loss caused by them to the Panchayat or for waste or misapplication of Panchayat Funds. [*Para.* 4.]

No time limit is prescribed under the Act for audit proceedings being taken or completed. It is therefore clear that section 173 has no application to surcharge proceedings and recovery of amounts thereunder and consequently, the period of limitation prescribed under section 173 cannot have application to audit proceedings. [*Paras.* 5 *and* 6.]

Where there are seemingly inconsistent provisions in an Act or between a section of the Act and the Rules framed thereunder, the attempt and the effort of the Court must be to reconcile the two situations as far as possible and give effect to the intention of the Legislature by construing harmoniously the conflicting provisions. [*Para.* 9.]

Even if section 173 were to be construed as a general provision covering all cases wherein the Panchayat or Council will be entitled to return of amounts lost by reason of waste, misapplication etc., still rule 5 must perforce be construed as a special provision dealing with disallowance and surcharge by auditors and one capable of co-existing with the other provisions of the Act. The period of limitation prescribed under section 173

*C.M.A. Nos. 475 and 476 of 1971.

1st November, 1974.

cannot govern or regulate the provision of rule 5. [*Para.* 9.]

Cases referred to :—

J. K. Cotton Spinning and Weaving Mills v. *State of Uttar Pradesh*, (1960-61) 19 F.J.R. 436: (1961) 3 S.C.R. 185: (1962) 1 S.C.J. 417 : A.I.R. 1961 S.C. 1170; *M. Aagiah* v. *Mohammed Abdul Kareem*, (1960) 2 An.W.R. 416: A.I.R. 1961 A.P. 201 (F.B.); *Vaidyanatha* v. *Life Insurance Corporation of India*, I.L.R. (1963) Mad. 761: (1965) 2 Lab.L.J. 55: A.I.R. 1964 Mad. 24 ; *Hansraj* v. *Dehra Dun M. E. T. and Company*, 64 M.L.J. 403 : 60 I.A. 13: A.I.R. 1933 P.C. 63; *Burrakur Coal Company Ltd.* v. *Labour Appellate Tribunal*, A.I.R. 1958 Cal. 226; *V. Jayarama Gounder* v. *Auditor, Rayandapuram Panchayat Board, represented by Revenue Divisional Officer, Tiruvannamalai*, C.M.A. No. 371 of 1971, dated 10-8-1973.

Appeals against the order of the Court of the District Judge, North Arcot at Vellore, dated 20th October, 1971 and 22nd September, 1971 and made in O.P. No. 4 of 1971 and O.P. No. 53 of 1970 respectively (R.C. B-7 28414 of 1968 dated 30th September, 1970 of the Revenue Divisional Officer, Tiruvannamalai).

B. Kumar for *T. R. Rajagopalan*, *V. Janakiraman* and *M. Krishnaswamy*, for Appellant.

N. Thiagarajan, for Additional Government Pleader, for Respondent.

The Court made the following

ORDER.—These two appeals, arising out of O.P. No. 4 of 1971 and O.P. No. 53 of 1970 on the file of the Court of the District Judge of North Arcot at Vellore, involve common questions of law.

2. In C.M.A. No. 475 of 1971, the appellant, a former President of the Kizhchettipattu Panchayat Board, was surcharged by the Auditor, by his order dated 30th September, 1970 a sum of Rs. 649-71P. on the ground the appellant had not spent the entire sum of Rs. 3,089-15P. drawn by him from the Panchayat funds for road work, but had spent only Rs. 2,439-44P. and consequently, the appellant had to make good the loss of Rs. 649-71P. caused to the Panchayat. In C.M.A. No. 476 of 1971, the appellant, who was the President of Ammoor Panchayat from 1958 to 1965, was surcharged by the Auditor a sum of Rs. 715-73P by his order dated 28th June, 1970 on the ground the appellant had not brought into account the usufructs of some tamarind trees belonging to the Panchayat which had been taken on lease by him, and further, had also drawn moneys for purchase of cement which was subsequently found to have been not utilised for the Panchayat. Both the appellants filed applications before the District Judge, under Rule 6 (1) (*a*) of the Surcharge and Disallowance Rules (hereinafter referred to as the Rules) framed under section 178 (2) of the Madras Panchayats Act and prayed for the surcharge order being set aside. Apart from contending, in their respective applications that the surcharge order was unsustainable on facts, the appellants also contended the surcharge proceedings were barred by limitation. The learned District Judge overruled both the objections and sustained the order of surcharge. In these appeals, the appellants challenge the order of surcharge and the order of the learned District Judge, only on the ground of limitation.

3. The contention of the appellants is that the order of surcharge was passed beyond three years after they had rendered accounts and held office as President, and as such, the surcharge order was really barred by limitation. It is common ground the order of surcharge was passed beyond a period of three years after the amounts had been drawn or collected and failed to be remitted by the appellants. In support of their contention, the appellants place reliance on section 173 of the Act, which is to the following effect:

" *Section* 173 (1)—The president, executive authority and every member of a panchayat and the chairman, commissioner and every member of a panchayat union council shall be liable for the loss, waste or misapplication of any money or other property owned by or vested in the panchayat or panchayat union council if such loss, waste or misapplication is a direct

consequence of his neglect or misconduct; and a suit for compensation may be instituted against him in any Court of competent jurisdiction by the panchayat or panchayat union council with the previous sanction of the Inspector.

(2) Every such suit shall be commenced within three years after the date on which the cause of action arose".

To buttress the contention that the Legislature intended that any suit instituted against the president, executive authority and member of a panchayat or the chairman, commissioner and member of a panchayat union council for compensation for the loss or waste or misapplication of funds caused by him to the panchayat or panchayat union council as the case may be should be commenced within three years after the date on which the cause of action arose, the appellants rely upon the period of limitation set under section 165 of the Act in respect of distraint or suits or prosecutions launched upon to recover tax or other sums due to a panchayat or panchayat union council. Section 165 is to the following effect:

"No distraint shall be made, no suit shall be instituted and no prosecution shall be commenced in respect of any tax or other sum due to a panchayat or panchayat union council under this Act or any rule, by-law, regulation or order made under it after the expiration of a period of three years from the date on which distraint might first have been, a suit might first have been instituted or prosecution might first have been commenced, as the case may be, in respect of such tax or sum".

The argument advanced is that the order of surcharge in each of the appeals is barred by limitation as it was passed beyond a period of three years from when moneys were drawn for meeting the expenditure or moneys were realised for and on behalf of the local body.

4. Arguing *contra*, Mr. G. Ramaswami, learned counsel for the Government contends that the Legislature has specifically made provision for Rules relating to the powers of Auditors in the matter of surcharge under the Act and the Rules are a complete Code in themselves in so far as surcharge proceedings are concerned, and it is only those Rules which would govern the rights of parties in respect of orders of surcharge and recovery of disallowed amounts. To appreciate the argument of the learned counsel, it is necessary to make reference to section 178 of the Act and relevant portions therein, since it is under that provision the Government have been conferred powers by the Legislature to frame Rules on various matters. Sub-section (1) of section 178 is worded as follows:—

"The Government shall, in addition to the rule making powers conferred on them by any other provisions contained in this Act, have power to make rules generally to carry out the purposes of the Act".

Sub-section (2) is to the following effect:

"In particular, and without prejudice to the generality of the foregoing power, the Government may make rules etc., etc."

Clause (*xvi-a*) of sub-section (2) of section 178, which was inserted by Act XVIII of 1964 is the relevant clause relating to powers of Auditors to disallow and surcharge items etc., and it is in the following terms:

"as to the powers of auditors to disallow and surcharge items, appeals against orders of disallowance or surcharge, and recovery of sums disallowed or surcharged."

By virtue of clause (*xvi-a*) of sub-section (2) of section 178, the Government passed G.O.Ms. No. 1127, L. A., dated 18th May, 1965, and framed Rules relating to the powers of Auditors in the matter of surcharge under the Madras Panchayats Act. The Rules were to be effective from 2nd September, 1964. Rule (1) enjoins the commissioner of a panchayat union council of the executive authority of a panchayat to submit all accounts to auditors appointed under section 141 of the Act, as required by the auditors. Rule 2 lays down the powers of

auditors to summon books, deeds, contracts, accounts, vouchers, receipts or other documents for perusal or examination and also to require any person appearing before the auditors to make and sign declarations, answer questions, prepare and furnish statements etc. Rule 3 lays down the procedure to be followed by the auditors on scrutiny of accounts, statements etc., and their duty to report to the panchayat or the panchayat union council any defect, impropriety, irregularity etc. in the expenditure or in the recovery of moneys due to the panchayat or the panchayat union council as the case may be. Sub-rule (*b*) concerns with the report to be made in the case of loss, waste, or misapplication of money etc., and reads as follows:

> "The auditors shall report to the Panchayat or Panchayat Union Council any loss, waste or misapplication of money or other property owned by or vested in the Panchayat or Panchayat Union council if such loss, waste or misapplication is a direct consequence of his neglect or misconduct, with the names of persons directly or indirectly responsible for such loss, waste or misapplication".

Rule 4 has reference to the remedial measures the Commissioner or the Executive Authority has to take to remedy the defects or irregularities pointed out by the Auditors. Rule 5 sub-rule (1) gives power to the Auditors to disallow every item contrary to law and surcharge the same on the concerned person, and is to the following effect:

> "Any auditor empowered by the Government may disallow every item contrary to law and surcharge the same on the person making or authorising the making of the illegal payments and may charge against any person responsible therefor the amount of any deficiency, loss or unprofitable outlay incurred by the negligence or misconduct of that person or of any sum, which ought to have been, but is not brought to account by that person and shall, in every such case, certify the amount due from such person".

Rule 5 (1) has an *Explanation*, but we are not concerned with it in these appeals. Sub-rule (2) of rule 5 makes it obligatory for the Auditor to give written reasons for his decision in respect of disallowances, surcharge or charge and further lays down that a copy of such order should be sent by registered post to the person against whom the order is made. Sub-rule (3) of rule 5 refers to the effect of the failure of the surcharged person to receive the order and also states that the time limit of fourteen days fixed in Rules 6 and 7 for compliance with the surcharge order is to be calculated from the date of such refusal. Rule 6 gives the option to an aggrieved person to challenge the order of surcharge by either applying to the principal civil Court of original jurisdiction or to appeal to Government. Sub-rule (2) of rule 6 provides that if the aggrieved person has resorted to the civil Court, he has a right to prefer an appeal to the High Court against the order of the Court of first resort. Rule 7 states that every sum certified by the Auditor to be due from any person, if not paid by the person concerned, shall be recoverable in the same way as an amount decreed by the Court. Rule 8 gives the Government the power to waive recovery of the whole or any part of the surcharged amount and Rule 9 states that 'Government' referred to in the above Rules is the Government of Madras.

5. Mr. B. Kumar for Mr. T. R. Rajagopalan and Mr. Janakiraman, learned counsel for the appellants in the respective appeals, contends that rules 5, 6 and 7 referred to above have to be read and interpreted in conformity with section 173 and consequently, the limitation of three years prescribed in the said section must govern disallowance of amounts and surcharges as well. The principal question to be considered therefore, is whether section 173 governs the Rules framed under clause (*xvi-a*) of sub-section (2) of section 178 and thereby restricts the powers of disallowance and surcharge given to an auditor under rule 5 to a period of three years from the date on which the cause of action arose. Pausing here, for a moment, I may straightaway say that section 165 of the

Act, on which also reliance is placed by the appellant's counsel to contend that surcharge proceedings are also subject to a limitation period, has no relevance to the controversy on hand. Section 165 refers to distraint proceedings, suits and prosecutions taken on behalf of the Panchayat or the Panchayat Union Council in respect of any tax or other sum due under the Act or any rule, by-law, regulation or order made under it. This section cannot obviously have reference to the liability of the President, the Executive Authority and Member of a Panchayat or the Chairman, Commissioner and Member of Panchayat Union Council for the loss, waste or misapplication of any money or other property owned by or vested in the Panchayat or Panchayat Union Council as a consequence of his neglect or misconduct. For a liability of the latter kind, section 173 has been specifically enacted. Clearly, therefore, section 165 can have reference only to tax or other sums due to a Panchayat or a Panchayat Union Council from third parties, and not to compensation amounts the officers of a local body have to pay for the loss caused by them to the Panchayat or for waste or misapplication of Panchayat funds.

5. Coming, now, to the question as to whether there is a conflict between section 173 and the Surcharge Rules and as whether section 173 would override the Rules, a scrutiny of the provisions contained in the section and the Rules reveals beyond doubt that though there is a seeming and apparent similarity between section 173 and the Rules, in reality they deal with different situations and as such, the Rules cannot in any manner, be trammelled by the section. Firstly, it has to be seen that section 173 of the Act does not make reference to the appointment of auditors or their powers to isallow and surcharge items. On the other hand, it is clause (*xvi-a*) of sub-section (2) of section 178, that makes specific and pointed reference to the powers of auditors to disallow and surcharge items, besides appeals against orders of disallowance or surcharge and recovery of sums disallowed or surcharged. Such being the case, the Rules framed for surcharge and disallowance are directly and solely referable to section 178 (2) (*xvi-a*) and not to any portion of section 173 of the Act. That it was the intention of the Legislature to treat surcharge proceedings distinctly and not include them within the ambit of section 173, is made apparent by section 173 making reference to suits approved by Inspectors being instituted for compensation from the concerned officer-bearers for the loss caused to the Panchayat or council, whereas section 178 (2) (*xvi-a*) provides for Rules being framed to define and demarcate the powers of auditors to disallow and surcharge items and also the procedure for recovery of sums disallowed or surcharged. It could never have been the intention of the Legislature that disallowed and surcharged sums also should be recovered from the concerned office-bearers by means of suits as envisaged under section 173, as clause (*xvi-a*) contemplates as mode of recovery by other means than a suit. It may further be seen that clause (*xxii*) of section 178 (2) relates to the powers of Government to make rules for realisation of any tax or other sum due to a Panchayat or Panchayat Union Council either by distraint and sale of moveable property or by prosecution before a Magistrate or by a suit or otherwise. This clause is related to, and has its foundation in, section 165, because that section also deals with recovery of dues by distraint proceedings or institution of suit or launching or prosecution. Such identity of procedure as is found between clause (*xxii*) and section 165 is not to be seen between Clause (*xvi-a*) and section 173. Yet another circumstance which significantly brings out the difference between section 173 and the Rules framed under clause (*xvi*-a) is that while section 173 makes reference to a suit being instituted for compensation, Rule 7 of the Rules framed under clause (*xvi-a*) lays down that every sum certified to be due from any person by the auditor shall be recoverable in the same way as an amount decreed by the Court. The two provisions, therefore, postulate entirely different situations in that, the section deals with the right of a Panchayat or Council to institute a suit for compensation while

the rule refers to a right in the nature of a decree to recover the amounts certified by the auditor. It is therefore clear that section 173 has no application to surcharge proceedings and recovery of amounts thereunder and consequently, the period of limitation prescribed under section 173 cannot have application to the latter class of cases.

6. From another view point also the contention of the appellant's counsel that the limitation clause provided in section 173 should be imported into the Rules cannot be sustained. No time limit is prescribed under the Act for audit proceedings being taken or completed. As already stated, section 173 makes no reference to the appointment of auditors, their rights and duties and the time limit within which they should complete the audit. Consequently, when there is no time limit for audit proceedings, it is futile for the appellants to contend that time limit of three years should be imported in respect of audit proceedings as well. Even assuming, for argument's sake, that section 173 governs surcharge proceedings as well, sub-section (2) of section 173 says that a suit as contemplated under sub-section (1) should be commenced within three years after the date on which the cause of action arose. Disallowance of amounts and surcharge orders can be passed on an office-bearer by an auditor only after the audit of accounts is taken up and completed. It is only then the cause of action will arise, and from that time the local body will certainly have a time limit of three years to institute proceedings against the officer or office-bearer to recover the amount. Viewed in that light, even section 173 does not lend support to the contention of the appellants that the surcharge proceedings are barred by limitation.

7. A conspectus of the Rules framed for surcharge and disallowance leads to the irresistible conclusion that it is a code by itself in so far as the disallowance and surcharge of amounts by auditors are concerned. As already stated, the Rules refer to the powers of the auditors to summon accounts, vouchers, receipts etc., to require any person appearing before them to sign declarations etc., and to fine persons failing to comply with any requisition lawfully made.

8. The Rules provide for service of the surcharge proceedings on the person concerned and the effect of his refusal to receive the order. Provision is also made for an appeal being preferred by the aggrieved person against an order of surcharge. Lastly, the Rules also lay down the procedure for recovery of the surcharged amount. Nothing is therefore left in doubt and every conceivable situation has been provided for in so far as surcharge and disallowance are concerned. This is again a factor which warrants the conclusion that the Rules in question have nothing to do with section 173 and cannot therefore be trammelled or curtailed in any manner by the period of limitation stipulated in that section.

9. Argumentatively, if the contention of the appellants' counsel is to be accepted, even then, the matter is not devoid of solution and harmonious interpretation. I may only refer to certain treatises on interpretation of statutes and certain decided cases to show that, where there are seemingly inconsistent provisions in an Act or between a section of the Act and the Rules framed thereunder, the attempt and effort of the Court must be to reconcile the two situations as far as possible and give effect to the intention of the Legislature by construing harmoniously the conflicting provisions. Firstly, it may be pointed out that the Rules are framed subsequent to the Act and are, therefore, later in point of time. In Maxwell on the Interpretation of Statutes (Twelfth Edition) at page 187, it is stated as follows :—" If two sections of the same statute are repugnant, the known rule is that the last must prevail." Apart from that, it may be seen that the dissimilarities between section 173 and rule 5 have the effect of making section 173 a general provision and rule 5 a special provision. No doubt, learned counsel for the appellants points out that the wordings of section 173 and rule 3 are more or less identical. But then, rule 3 does not govern Rule 5, nor does it have any impact on it. Rule 3 (*a*) concerns itself with the duty of the auditors to report to the Panchayat or Panchayat Union Council any material impropriety or irregularity

in the expenditure or in the recovery of moneys due to the Panchayat or Council in the accounts of the said Body; rule 3 (*b*) concerns itself with the duty of the auditors to report to the Panchayat or the Council any loss, waste, or misapplication of money or other property owned by or vested in the Panchayat or council due to the neglect or misconduct of any person. Rule 4 lays down the procedure which the Commissioner or Executive Authority has to follow for remedying the defects or irregularities pointed out by the auditors under Rule 3. Rule 5 has reference to an entirely different situation, *viz.*, the exercise of powers by an auditor to disallow items contrary to law and surcharge the same on the concerned person. It may be seen that it is not every auditor who can act under Rule 5, but only an auditor who is empowered by the Government, who can act in that manner. Consequently, Rule 5 gives the auditor a power to disallow every item contrary to law which is wider in import than the words, " loss, waste or misapplication of money or other property " found in rule 3. Rule 5 has also reference to the concerned person being charged for deficiency, loss or unprofitable outlay resulting from his negligence or misconduct. This rule is therefore of wider amplitude than rule 3 and deals with different types of situations not at all contemplated or provided for under section 173. It therefore amounts to a special provision even if section 173 is to be construed as a general provision relating to recovery of amounts the local body has lost by loss, waste or misapplication. The guideline afforded by Maxwell to deal with such a situation is contained in the following words, which are found at page 187 of the aforesaid book :

> "One may in which repugnancy can be avoided is by regarding two apparently conflicting provisions as dealing with distinct matters or situations. "

I may also refer with advantage to the following passage occurring in page 419 of Bindra's Interpretation of Statutes (5th Edition) :

> " When there are in a statute two provisions which are in conflict with each other, such that both of them cannot stand, they should, if possible, be so interpreted that effect can be given to both, and that a construction which renders either of them inoperative and useless should not be adopted except in the last resort. "

Again, at page 627 of the same book, it is stated as follows :—

> " A by-law is not repugnant to the general law merely because it creates a new offence, and says that something shall be unlawful which the law does not say is unlawful. It is repugnant if it makes unlawful that which the law says is lawful.................if it expressly or by necessary implication professes to alter the general law of the land...... if it adds something inconsistent with the provisions of a statute creating the same offence ; but if it adds something not inconsistent, that is not sufficient to make the by-law bad as repugnant ".

In *J.K. Cotton Spinning and Weaving Mills* v. *State of Uttar Pradesh*[1], the Supreme Court held as follows :

> " In the interpretation of statutes the Courts always presume that the Legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have effect. These presumptions will have to be made in the case of rule-making authority also............'We reach the same result by applying another well-known rule of construction that general provisions yield to special provisions'. "

Thier Lordships also approved the following passage occurring in *Pretty* v. *Solly*[2] (quoted in Craies on Statute Law at page 206, 6th Edition) :

> " The rule, is that whenever there is a particular enactment and a general enactment in the same statute and the latter, taken in its most comprehensive sense would overrule the former, the particular enactment must be operative, and the general enactment must

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1. (1960-61) 19 F.J.R. 436 at 442 : (1961) 3 S.C.R. 185: (1962) 1 S.C.J. 417 : A.I.R. 1961 S.C. 1170.
2. (1859) 26 Beav. 606.

be taken to affect only the other parts of the statute to which it may properly apply ".

On the question of interpretation of seemingly conflicting provisions in an enactment, a Full Bench of the Andhra Pradesh High Court held in *M. Agaiah* v. *Mohammed Abdul Kareem*[1] as follows :—

> " It is a well-settled canon of construction of statutes that the provisions of a statute should be so read as to harmonise one with the other and not to read a repugnancy into them. Even if two enactments appear to be inconsist nt, it must be seen that one is a qualification of the other ".

Again, at page 207, the Full Bench observed as follows :—

> " It is a well-established rule of interpretation of statutes that no provision of an enactment should be regarded as a superfluity. Courts cannot, without necessity or sound reason, regard any part of an enactment as redundant. They should alwavs incline to the view that every word was intended by the Legislature to have some meaning and effect."

This Court itself in *Vaidyanatha* v. *L.I.C. of India*[2], had to deal with sections 9 and 11 of the Life Insurance Corporation Act, 1956, as amended in 1957. Repelling the argument that section 11 was inconsistent with section 9 and that section 9 would govern all contracts of service, this Court held as follows :—

> " We are, however, unable to agree that section 9 will have application, to the contracts of service which the employees had with their previous managements. Section 11 deals specifically with the transfer of service of existing employees of the Insurers to the Corporation. The former section being of a general nature capable of covering all contracts, a reasonable interpretation of its scope will be not to extend its application to subjects specially dealt with by the latter provision, namely, section 11 of the Act. The latter provision deals with a separate subject which should alone apply to it ; otherwise there will be a conflict between sections 5, 9 and 11 ".

Following the ratio in these decisions, it may be seen that even if section 173 were to be construed as a general provision covering all cases wherein the Panchayat or Council will be entitled to recover amounts lost by reason of waste, misapplication etc., still rule 5 must perforce be construed as a special provision dealing with disallowance and surcharge by auditors and one capable of co-existing with the other provisions of the Act. In that view also, the period of limitation prescribed under section 173 cannot govern or regulate the provisions of rule 5.

10. Learned counsel for the appellants raise a contention that disallowance and surcharge dealt with under the rules cannot override the provisions contained in the Act itself, and would argue that the Rules can be given only a secondary place in juxtaposition with the sections in the Act. This argument contains a fallacy. Section 199 (1) of the Act lays down that all rules, notifications and orders made or issued under the Act shall be published in the Fort St. George Gazette and unless they are expressed to come into force on a particular day, shall come into force on the day on which they are so published. Sub-section (2) gives the Legislature a right to amend the Rules or to invalidate them. As long as the Legislature does not have recourse to the powers conferred on it under sub-section (2), the Rules will have as much statutory force as the Act itself. This position is clearly enunciated in Maxwell on Interpretation of Statutes (11th Edition) at page 49, in the following terms :

> " Instruments made under an Act which prescribes that they should be laid before Parliament for a prescribed number of days, during which period they may be annulled by a resolution of either House but that if not so annulled they are to be of the same effect as if contained in the Act and are to be judicially noticed, must be treated for all purposes of construction or obligation or otherwise exactly as if they were in the Act. "

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1. (1960) 2 An.W.R. 416 : A.I.R. 1961 A.P. 201 at 205 (F.B.).
2. I.L.R. (1963) Mad. 761 : (1965) 2 Lab. L.J. 55 ; A.I.R. 1964 Mad. 24 at 28.

Mr. B. Kumar advances another argument to nullify the provisions in the Rules which are at variance with section 173. According to him, surcharge is only a different mode of recovery of the sums due to the Panchayat from its officers or office-bearers, past or present, and consequently, the basic limitation prescribed under section 173, *viz.*, a three year limitation period must govern surcharge proceedings as well. He would further contend that what cannot be achieved by filing a suit under section 173 cannot be sought to be accomplished by having recourse to surcharge proceedings and that the surcharge proceedings will be as much vulnerable to the law of limitation as suits themselves would be under section 173. In support of this argument, learned counsel places reliance on *Hansraj* v. *Dehra Dun M.E.T. and Company*[1]. In that case, the Board held that amounts which the Company itself could not have recovered by reason of limitation, the liquidators of the Company, who had entered the scene when winding up operations of the Company commenced, would not also be entitled to recover. This decision has no relevancy to the facts of the instant case. The error committed by Mr. B. Kumar is in presuming that a surcharge proceeding is only a mode of recovery and cannot be considered different from a suit. As already referred to surcharge proceedings are not to be equated with suits or deemed a substitute for suit because an order of surcharge is to be given the same weight as a decree of Court.

11. Yet another contention of Mr. Kumar is that the Rules framed under an Act cannot be inconsistent with the provisions of the Act and have overriding effect over them. To lend force to this argument, he places reliance on *Burrakar Coal Company Limited* v. *Labour Appellate Tribunal*[2], where it is stated that a Rule or a by-law made under a statute cannot, unless there are express indications in the statute itself, override the provisions of other statutes or the general law. This argument can have attraction only if section 173 is found to include in its ambit surcharge proceedings as well. When such is not the case, the plea that the Rules framed under the Act ought not to be given recognition in so far as they are repugnant to section 173, cannot be sustained.

12. It only now remains for me to meet the argument of Mr. B. Kumar that, on a former occasion, I have held in *V. Jayarama Gounder* v. *Auditor, Rayandapuram Panchayat Board, represented by Revenue Divisional Officer, Tiruvannamalai*[1] that the period of limitation prescribed in section 173 would govern surcharge proceedings as well. On a perusal of the judgment, I find that the contention of learned counsel is untenable. Though that was also a case arising out of surcharge proceedings against a Panchayat Board President, the grievance of the appellant's counsel therein was that the District Judge had totally failed to consider the plea of limitation raised by the appellant. While, therefore, remitting the matter to the District Judge for fresh consideration, all that I have stated in that case was, it would *prima facie* appear that the surcharge proceedings should have been instituted against the President at least within a period of three years of his ceasing to be the President of the Panchayat. That appeal was not argued at length and in depth as the appeals on hand have been argued, and even there, I have not conclusively held that surcharge proceedings would, undoubtedly, be governed by the provisions of section 173. The decision rendered in the above said case cannot therefore be of any assistance to the appellants.

13. In the result, both the appeals are found to be devoid of merit and are consequently dismissed. But there will be no order as to costs in either.

R.S. *Appeals dismissed.*

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1. 64 M.L.J. 403 : 60 I.A. 13 : A.I.R. 1933 P.C. 63.
2. A.I.R. 1958 Cal. 226.

1. C.M.A. No. 371 of 1971, dated 10th *August*, 1973.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*S. Maharajan, J.*

Eranthankandy Ponathil Sankaran ... *Appellant**

v.

Chirukandoth Mundayodan Narayani Ammal and others ... *Respondents.*

Mahe Land Reforms Act (1968), *section* 125—*Suit for recovery of possession—House—Tenant claiming to be Kudikidappukaran—Decision of Revenue Divisional Officer against tenant—Whether binding on civil Court.*

Though the order of the Land Tribunal or the Land Board is expressly given immunity from judicial scrutiny, by the ordinary civil Court by the Mahe Land Reforms Act no such immunity is given to the order of the Deputy Tahsildar or the Revenue Divisional Officer relating to exclusion or inclusion of a person from the register of Kudikidappukarans. [*Para.* 6.]

There is nothing in the Mahe Land Reforms Act which bars the jurisdiction of a civil Court from investigating whether a tenant is a kudikidappukaran or not, notwithstanding the fact that the Deputy Tahsildar and the Revenue Divisional Officer have rejected the tenant's claim to be a kudikidappukaran. [*Para.* 7.]

Cases referred to:—

Srinivasa v. *State of Andhra Pradesh*, (1970) 2 S.C.R. 714 : (1971) 1 S.C.J. 192 : (1971) 1 M.L.J. (S.C.) 26 : (1971) 1 An. W.R. (S.C.) 26: A.I.R. 1971 S.C. 71 ; *Secretary of State* v. *Mask and Company*, 67 I. A. 222 : A.I.R. 1940 P.C. 105 : I.L.R. (1940) Mad. 599 : (1940) 2 M.L.J. 140 ; *Dhulabhai* v. *State of Madhya Pradesh*, (1969) 1 S.C.J. 925 : (1968) 3 S.C.R. 662 : A.I.R. 1969 S.C. 78.

Appeal against the decree of the District Court (3rd Additional District Judge) Pondicherry, dated 25th September, 1972 in Appeal Suit No. 97 of 1971, preferred against the decree of the Court of the District Munsif of Mahe in Original Suit No. 9 of 1971.

A. Subramania Iyer and *C. Chinnappan*, for Appellant.

Miss O. K. Sridevi, for Respondents.

The Court delivered the following

JUDGMENT.—The defendant has preferred this second appeal attacking the judgment of the third Additional District Judge, Pondicherry, in A.S. No. 97 of 1971, whereby he allowed the plaintiff's appeal against the judgment of the District Munsif of Mahe, who dismissed the suit filed by the plaintiffs for recovery of possession of the suit house from the defendant as well as for arrears of rent due by him as tenant. According to the plaintiffs, the suit house and the paramba on which it stands belong to the plaintiffs on kanam — kuzhikanam right, and the house was let out to the defendant on a monthly rent of Rs. 3 under a registered lease deed, dated 7th April, 1955. Subsequently, under an oral agreement dated 7th April, 1957, the lease was renewed for a further period of six months on a monthly rent of Rs. 4. After the expiry of the lease, the defendant was holding over without paying arrears of rent since 7th May, 1968. When the plaintiffs called upon the defendant to vacate the buildings, the defendant applied to the Deputy Tahsildar (Land Reforms), Mahe, under the Mahe Land Reforms Act for registration of himself as a kudikidappukaran , but the Deputy Tahsildar dismissed his claim, whereupon the defendant preferred a revision petition to the Revenue Divisional Officer, Mahe, who dismissed it on the ground that the defendant was not a kudikidappukaran as defined in the Land Reforms Act. The plaintiffs issued a registered notice, dated 5th November, 1970, calling upon the defendant to vacate, but the defendant failed to comply with the demand. The plaintiffs, therefore, instituted the suit for recovery of the Schedule property and of rent arrears amounting to Rs. 136 with costs.

2. The defendant, in his answer, while admitting that he was a tenant liable to pay monthly rent of Rs. 4, contended that

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*S.A.No. 2201 of 1972 (P.) 27*th November*, 1974.

he had paid rent upto November, 1969, and that as he had thatched the house in 1970 at a cost of Rs. 50, he was entitled to set off the same towards the arrears of rent. He also contended that he had thatched the house at his own cost in 1971 and spent Rs. 66.33 on that account, and that this amount was also liable to be set off against the rent payable by him. He further contended that neither he nor his wife was possessed of any property or land to build a homestead upon, that he is a kudikidappukaran within the Mahe Land Reforms Act and that he is not liable to be evicted from the house.

3. The learned District Munsif, Mahe, found that the order of the Deputy Tahsildar, dismissing the petition filed by the defendant on the ground that he is not a kudikidappukaran within the Mahe Land Reforms Act was not binding upon the civil Court. He, therefore, proceeded to discuss at length the evidence adduced by the parties and held that the defendant was not possessed of any landed property where he could erect his homestead and that consequently he is a kudikidappukaran within the Mahe Land Reforms Act and that he is not liable to be evicted from the suit house. He further held that inasmuch as the plaintiffs were liable to thatch the house every year at their own cost and it was admitted by the plaintiffs that the defendant had thatched the house in 1970 and 1971, at his own cost, he was entitled to set off the cost of thatching towards arrears of rent due and if the set off were allowed, the defendant would not be liable to pay any amount by way of arrears of rent. In this view, the suit was dismissed by the trial Court with costs.

4. Upon an appeal preferred by the plaintiffs, the learned Additional District Judge, Pondicherry, discussed the relevant provisions of the Mahe Land Reforms Act, and held that the question whether the defendant is a kudikidappukaran or not was exclusively within the jurisdiction of the Deputy Tahsildar, that his decision that he was not is binding upon the civil Court and that it was incompetent on the part of the civil Court to ignore the finding of the prescribed authority and hold upon independent evidence adduced before it that the defendant is a kudikidappukaran entitled to protection under the Mahe Land Reforms Act. The first appellate Court further held that the tenancy of the defendant had been properly terminated by the notice to quit issued by the plaintiffs and that consequently the plaintiffs were entitled to the relief of eviction prayed for. As the plaintiffs did not press the claim for arrears of rent, the first appellate Court, after reversing the judgment and decree of the trial Court, granted a decree in favour of the plaintiffs directing eviction of the defendant. The first appellate Court directed the defendant to pay the plaintiffs' costs.

5. The main points that arise for determination in this second appeal are :

1. Whether the Deputy Tahsildar and the Revenue Divisional Officer mentioned in the Mahe Land Reforms Act have exclusive jurisdiction to decide whether the defendant is a kudikidappukaran entitled to the benefits of the Act ?

2. Whether the finding of the prescribed authority that the defendant is not a kudikidappukaran is binding on the civil Court ?

3. If not, whether upon the evidence on record, the defendant is a kudikidappukaran entitled to protection under the Act from eviction ?

Points Nos. 1 *to* 3.—The Mahe Land Reforms Act, 1968, is largely modelled upon the Kerala Land Reforms Act, 1963. Most of the sections in the Mahe Land Reforms Act reproduce word for word the language of the Kerala Land Reforms Act, 1963, with certain minor variations to suit local conditions. The Kerala Land Reforms Act, 1963, was drastically amended from time to time in the light of judicial pronouncements (*Vide* Act XII of 1966, Act IX of 1967 Act XXXV of 1969, Act XXV of 1971 and Act XVII of 1972). On the other hand, the Mahe Land Reforms Act, 1968, has remained unamended upto date with the result that the several loopholes therein remain to be plugged yet. It purports to be a comprehensive legislation relating to land reforms for the Mahe region of the Union Territory of Pondicherry. Its main object is to con-

fer upon cultivating tenants such benefits as fixity of tenure, and fair rent, abolition of intermediaries and distribution to the landless of the lands held in excess of the prescribed ceiling. Though a kudikidappukaran is not necessarily an agricultural labourer, he is also conferred certain benefits under the Act.

6. Section 2 (24) of the Mahe Land Reforms Act defines " Kudikidappukaran " to mean,

" a person who has neither a homestead nor any land exceeding three cents in extent, either as owner or as tenant in possession, on which he could erect a homestead, and—

(*i*) who has been permitted, with or without an obligation to pay rent, by a person in lawful possession of any land, to have the use and occupation of a portion of such land for the purpose of erecting a homestead ; or

(*ii*) who has been permitted by a person in lawful possession of any land, to occupy, with or without an obligation to pay rent, a hut belonging to such person and situate in the said land ;

and " Kudikidappu " means the land and the homestead or the hut so permitted to be erected or occupied together with the assessment attached thereto :"

Explanation I to this definition says :

" For the purposes of this clause, ' hut ' means any dwelling house which was constructed at a cost not exceeding five hundred rupees, or could have, at the time of construction, yielded a monthly rent not exceeding five rupees."

Explanation II says :

" Any person who was in occupation of a kudikidappu on the 28th April, 1962, and who continued to be in such occupation at the commencement of this Act, shall be deemed to be in occupation of such kudikidappu with permission as required under this clause."

Section 83 of the Act provides :

" (1) No kudikidappukaran shall be liable to be evicted from his kudikidappu except on the following grounds namely :—

(*i*) that he has alienated his right of kudikidappu to a person other than—

(*a*) a member, of his family, or

(*b*) a person who has no other homestead or any land exceeding three cents in extent, either as owner or as tenant in possession, on which he could erect a homestead,

(*ii*) that he has rented or leased out his kudikidappu to another person,

(*iii*) that he has ceased to reside in the kudikidappu continuously for a period of two years, or

(*iv*) that he has another kudikidappu or has obtained ownership and possession of land which is fit for erecting a homestead."

Section 84 prescribes,

"(1) All arrears of rent, if any, payable, by a kudikidappukaran on the date of the commencement of this Act, whether the same be payable under any law, custom or contract or under a decree or order of Court, shall be deemed to be fully discharged if he pays one year's rent or the actual amount in arrears, whichever is less.

(2) On and after the commencement of this Act, notwithstanding any contract, decree or order of Court, a kudikidappukaran shall not be required to pay more than six rupees yearly as rent in respect of his kudikidappu :"

There is also a provision that where the owner of the land in which there is a kudikidappu considers that the kudikidappu is so located as to cause inconvenience to him, he may require the kudikidappukaran to shift to another part of the land. Under section 85, if the kudikidappukaran does not comply with the requisition to shift to a new site, the person in possession of the land or the owner may institute a suit against him for the purpose in the civil Court. Section 88 provides that the Government shall cause a register of kudikidappukarans to be prepared and maintained in each village, and the register shall show the description

and the location of the kudikidappu and its extent, the name of the landowner and of the person in possession of the land in which the kudikidappu is situate and the name and address of the kudikidappukaran and other particulars. Under section 88 (3), the register shall be prepared and maintained by such officer and in such manner as may be prescribed. The prescribed officer in this case is the Deputy Tahsildar, Mahe. Section 88 (4) says,

> "The prescribed Officer shall, before the preparation of the register, publish a notice in the village inviting applications from kudikidappukars for registration, to be presented before such date as may be specified in the notice."

Under section 88 (5), the prescribed Officer shall, after enquiry and after giving an opportunity to the landowner or other person in possession of the land to be heard, register the kudikidappukaran or reject the application. Section 88 (7) says:

> "Any gazetted officer authorised by the Government in this behalf, may, either of his own motion or on an application by any person aggrieved by the registration of a kudikidappukaran under sub-section (5) or the rejection of an application under that sub-section, call for the record of any proceeding which has been taken by the prescribed officer under this section and may make such enquiry or cause such enquiry to be made and may pass such orders thereon, as he thinks fit :"

Section 90 of the Act says:

> "Where, in any suit or other proceeding for the eviction of a cultivating tenant, a holder of a kudiyiruppu or a kudikidappukaran, from his holding kudiyiruppu or kudikidappu, as the case may be, whether pending at the commencement of this Act or instituted after such commencement, the cultivating tenant, or the holder of a kudiyiruppu or the kudikidappukaran, makes a representation to the Court in which such suit or other proceeding is pending or instituted that no record of rights in respect of the holding or register of kudikidappukaras in respect of the village in which the kudikidappu is situate, as the case may be, has been prepared, the Court shall not proceed with the suit or proceeding until the record of rights in respect of the holding or the register of kudikidappukarans, as the case may be, is prepared and made available to it and the Court shall also by order direct the officer specified under sub-section (3) of section 35, to prepare a record of rights in respect of the holding, or, as the case may be, a register of kudikidappukarans and to file the same in Court, and such officer shall cause the same to be prepared in the manner prescribed."

It may be noted that there is nothing in section 90, which says that the Court is bound to accept the correctness of the entries in the register of kudikidappukars, which is to be filed by the prescribed officer. Section 134 of the Act says as follows :

> "Nor order of the Land Tribunal or the Land Board under this Act shall be called in question in any Court, except as provided in this Act."

The head-note to this section is entitled, "Bar of jurisdiction of Courts". It is significant that the order of the Deputy Tahsildar or the Revenue Divisional Officer as to whether a person is a kudikidappukar or not is omitted from section 134 which is the only section in the Act which bars the jurisdiction of civil Courts. In other words, though the order of the Land Tribunal or the Land Board is expressly given immunity from judicial scrutiny, by the ordinary civil Court, no such immunity is given to the order of the Deputy Tahsildar or the Revenue Divisional Officer relating to the exclusion or the inclusion of a person from the register of kudikidappukars. What then was the intention of the Legislature in omitting reference to such orders from section 134 of the Act ? In Rule 57 of the Rules framed under the Mahe Land Reforms Act, clause (1) says that the register of kudikidappukars shall be prepared by an officer not below the rank of a Deputy Tahsildar and shall be maintained in the offices of the Deputy Tahsildar and the village officer, and the Deputy Tahsildar shall, wherever necessary, amend the

entries in the register maintained in the Deputy Tahsildar's office and communicate such amendments to the Village Officer for carrying them out in the copy of the register in the village. Clause (2) of rule 57 says that the entries in the register shall be admissible in evidence before any Court or Tribunal. It is noteworthy that this rule does not say that the entries in the register shall be taken by the civil Court to be true and shall not be called in question by the civil Court. All that clause (2) of rule 57 says is that the entries in the register shall be admissible in evidence before any Court or tribunal, which would mean that the entries in the register of kudikidappukars will have no more than evidentiary value, and can be accepted or rejected by a civil Court in the light of other relevant evidence. A perusal of the different provisions of the Act would disclose another reason why the Legislature while giving immunity from judicial scrutiny to the orders of the Land Board or the Land Tribunal, refrained from doing so in respect of the orders of the Deputy Tahsildar and the Revenue Divisional Officer in respect of kudikidappukars. The Land Board and the Land Tribunal are given under section 111 of the Act all the trappings of a civil Court. Under section 109, the Land Tribunal shall consist of a single member who shall be a judicial officer of the rank of judge *de paix*. Under section 110, the Land Board shall consist of a single member, who shall be the Secretary to Government, Revenue and Development Department, Pondicherry, or such other officer of an appropriate rank, as the Government may specify for the purpose. Under section 112 of the Act, any person aggrieved by the orders of the Land Tribunal may appeal against such order to the President, Court of First instance, Pondicherry. Under section 113, any person aggrieved by any final order passed in appeal by the President, Court of first Instance, or any final order passed by the Land Board may prefer a petition to the High Court against the order on the ground that either body has decided erroneously or failed to decide any question of law. No such-self-contained hierarchy of Tribunals has been provided in respect of the orders of the officers prescribed by the Act for the maintenance of the register of kudikidappukars. The question whether a person is a kudikidappukaran is a very complicated legal question and can be decided satisfactorily only by a legally trained Tribunal is the light of the complicated definition of "kudikidappukaran" contained in the Act. The Act shows that no jurisdiction was given to the Land Tribunal or the Land Board to decide whether a person is a kudikidappukaran or not. It is in these circumstances that the Legislature must have deliberately omitted from section 134 any reference to the order of the Deputy Tahsildar or the Revenue Divisional Officer relating to the preparation of the register of kudikidappukars and refrained from conferring upon such orders immunity from scrutiny by the ordinary civil Courts, which orders of the Land Tribunal or the Land Board under the Act are expressed to enjoy.

7. Reference may be made in this connection to the subsequent amendments made by the Kerala Legislature to the corresponding section 125 in the Kerala Land Reforms Act. That section, as amended by Act XXXV of 1969 and Act XVII of 1972, reads as follows :

> "125. *Bar of jurisdiction of civil Courts.*—(1) No civil Court shall have jurisdiction to settle, decide or deal with any question or to determine any matter which is by or under this Act required to be settled, decided or dealt with or to be determined by the Land Tribunal or the appellate authority or the Land Board or the Taluk Land Board or the Government or an officer of the Government.
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> * * *
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> (2) No order of the Land Tribunal or the appellate authority or the Land Board or the Taluk Land Board or the Government or an officer of the Government made under this Act shall be questioned in any civil Court, except as provided in this Act.
>
> (3) If in any suit or other proceeding any question regarding rights of a tenant or of a kudikidappukaran (including a question as to whether a person is a tenant or a kudikidappukaran) arises, the civil Court shall stay

the suit or other proceeding and refer such question to the Land Tribunal having jurisdiction over the area in which the land or part thereof is situate together with relevant records for the decision of that question only.

(4) The Land Tribunal shall decide the question referred to it under sub-section (3) and return the records together with its decision to the civil Court.

(5) The Civil Court shall then proceed to decide the suit or other proceedings accepting the decision of the Land Tribunal on the question referred to it.

(6) The decision of the Land Tribunal on the question referred to it shall, for the purposes of appeal, be deemed to be part of the finding of the civil Court."

These amendments made by the Kerala Legislature were consequential upon the grant of certain powers to the Land Board and the Land Tribunal even in respect of kudikidappukars. That is why the Kerala Legislature has, under section 125, conferred immunity from judicial scrutiny, not only upon the orders of the Land Tribunal or the Land Board, but also upon the orders of an officer of the Government made under the Act. Under the amended section 29 (8) of the Kerala Land Reforms Act, the record of rights prepared under that section is made "admissible in evidence before any Court or tribunal and every entry in any record of rights which has become final shall until the contrary is proved be presumed to be correct." It is true thus found that even under the amended Kerala Land Reforms Act, the entry in the record of rights prepared by the Tahsildar or the Revenue Divisional Officer is not binding upon the Civil Court, but shall be presumed by the civil Court to be correct until the contrary is proved. An examination of the corresponding provisions of the Kerala Land Reforms Act and the Mahe Land Reforms Act reveals that it was never the intention of the Legislature that the orders of the Deputy Tahsildar and the Revenue Divisional Officer in respect of the status of a person as a kudikidappukaran should be binding on the ordinary civil Court. In coming to this conclusion, I have been guided by the principles laid down by the Supreme Court in *Srinivasa* v. *State of Andhra Pradesh*[1]:

"The general principle on which the jurisdiction of civil Courts can successfully be excluded in respect of decisions by special Tribunals is well-settled. The difficulty usually arises in its application to given cases. As observed by the Privy Council in *Secretary of State* v. *Mask and Company*[2], the exclusion of the jurisdiction of the civil Courts must either be explicitly expressed or clearly implied. Further even if the jurisdiction is so excluded the civil Courts have jurisdiction to examine into the cases where the provisions of the Act have not been complied with or the statutory Tribunal has not acted in conformity with the fundamental principles of judicial procedure. It is unnecessary to refer to other cases dealing with this question. We need only refer to the recent decision of this Court in *Dhulabhai* v. *State of Madhya Pradesh*[3], in which after an exhaustive discussion of the case law the legal position was summarised by the Court speaking through Hidayatullah, C.J., as follows :

"(1) Where the statute gives a finality to the orders of the special tribunal the civil Court's jurisdiction must be held to be excluded if there is adequate remedy to do what the civil Courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure. (2) Where there is an express bar of the jurisdiction of the Court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil Court.

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1. (1970) 2 S.C.R. 714 : (1971) 1 S.C.J. 192 : (1971) 1 M.L.J. (S.C.) 26 : (1971) 1 An.W.R. (S.C.) 26 : A.I.R. 1971. S.C. 71 at 75.
2. I.L.R. (1940) Mad. 599 : (1940) 2 M.L.J. 140 : 67 Ind. App. 222 : A.I.R. 1940 P.C. 105.
3. (1969) 1 S.C.J. 925 : (1968) 3 S.C.R. 662 : A.I.R. 1969 S.C. 78.

Where there is no express exclusion, the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the enquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in civil Courts are prescribed by the said statute or not."

As I have already pointed out, section 125 of the Mahe Land Reforms Act, while giving a finality to the orders of the Land Tribunal and the Land Board and expressly excluding the civil Court's jurisdiction in that behalf, refrains from giving such a finality to the orders of the Deputy Tahsildar and the Revenue Divisional Officer in respect of the claim of any person as a kudikidappukaran entitled to the benefits of the Act. The examination of the remedies and the scheme of the Act would also show that whereas the Land Tribunal and the Land Board have all the functions of a judicial tribunal and are governed by the Civil Procedure Code, and their orders are amenable to appeal to the Court of First Instance, Pondicherry, and to revision by the High Court, the proceedings of the Deputy Tahsildar and the Revenue Divisional Officer in respect of the preparation of the register of kudikidappukars are purely administrative in character and, therefore, no judicial remedies have been provided for in respect of their orders. The utmost that can be said about the entries made by the Deputy Tahsildar and the Revenue Divisional Officer in the register of kudikidappukars is that they may enjoy an evidentiary value which the civil Court may accept or reject in the light of the independent evidence adduced by the parties before it. I would, therefore, while disagreeing with the first appellate Court and agreeing with the trial Court, hold that there is nothing in the Mahe Land Reforms Act which bars the jurisdiction of a civil Court from investigating whether the defendant is a kudikidappukaran or not, notwithstanding the fact that the Deputy Tahsildar and the Revenue Divisional Officer have rejected the defendant's claim to be a kudikidappukaran.

8. The next question arises whether the defendant is a kudikidappukaran within the meaning of the Act. The only ground upon which the plaintiffs contended that the defendant is not a kudikidappukaran is that he owns land exceeding three cents in extent, on which he could erect a homestead. According to the plaintiffs, the defendant is entitled to some share in Manikampoyil Paramba. The learned District Munsif has accepted the oral evidence of the defendant that Manikampoyil Paramba belonged to the Tavazhi of the defendant's father, who died about 26 years prior to his giving evidence, that after his death Ramunni, who is the present Karanavan, is managing the Manikampoyil Paramba, and that Manikampoyil Paramba is used for some religious rites on particular days of a year. The learned District Munsif has also accepted the evidence of D.W. 2, who is the present Karnavan of the Thavazhi, to the effect that after the death of the defendant's father, the defendant did not acquire any interest in the Manikampoyil Paramba, and that the defendant was not given any share therein. It is also the evidence of D.W. 2 that the property was not partitioned at all, because it belonged exclusively to the Tavazhi of the defendant's father. Exhibits X-1 to X-4 show that D.W. 2, Manikampoyil Ramunni, has been paying land revenue for the property, on behalf of himself and his sisters. D.W. 2 also denied that D.W. 1, the defendant, has any share or interest in the property. P.W. 1, the plaintiff's only witness, admitted in cross examination that there is a temple in the Manikampoyil Paramba, that it is an ancient temple, and that he did not know whether the temple belongs to Manikampoyil Tavazhi. He also admitted that Devaki and Ramunni were paying the land revenue for Manikampoyil Tavazhi after the death of Ambootty, the father of the defendant. Upon this evidence, the learned District Munsif rightly came to the conclusion that Manikampoyil Paramba does not

belong to the defendant and that the plaintiff had failed to prove that the defendant is possessed of any other landed property on which he could erect his homestead. In these circumstances, he rightly came to the conclusion that the defendant is a kudikidappukaran within the meaning of the Act, and, is, therefore, not liable to be evicted. A perusal of Exhibit A-4, the order of the Deputy Tahsildar shows that it is the result of a summary and superficial enquiry and has little regard for the facts established and the admissions made before the trial Court. I, therefore, accept the findings of the trial Court and answer these points in favour of the defendant.

9. In the result, the judgment and decree of the first appellate Court are set aside, and those of the trial Court restored, and the appeal allowed with costs throughout.

S.J. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*K. Veeraswami, CJ. and S. Natarajan, J.*

Rabia Bai .. *Appellant**

v.

The Custodian of Evacuee Property, Bombay and others .. *Respondents.*

Administration of Evacuee Property Act (XXXI of 1950), section 10 (2) (n)—Evacuee property—Sale—Confirmation rejected by Assistant custodian—Refund of sale consideration—Duty of custodian—Compensation Pool—What can be transferred to.

The power given to the Custodian under sections 7 to 9 of Act XXXI of 1950 to notify a property as evacuee property and to have the property vested in himself and take possession thereof, is one coupled with duties, one among which is the obligation created under section 10 (2) (*n*) to pay any person the sums of money he is found entitled to by the Custodian, out of the funds in his possession. [*Para.* 8.]

What can be transferred to the compensation pool can only be the remainder or the balance or the surplus, that is, after the Custodian discharges his obligations to claimants who are legitimately entitled to sums of money from the fund or assets of an evacuee. [*Para.* 9.]

Cases referred to :—

Rabia Bai v. *C. G. of E. Property*, (1961) 3 S.C.R. 448 : (1962) 1 S.C.J. 430: A.I.R. 1961 S.C. 1002; *Bhanu Pratap* v. *Assistant Custodian, E. P.*, (1966) 1 S.C.J. 228 : (1966) 1 S.C.R. 304 : A.I.R. 1966 S.C. 245; *Secretary of State for India in Council* v. *Kasturi Reddi*, (1963) I.L.R. 26 Mad. 268 : 12 M.L.J. 453; *Bank Voor Handel* v. *Hungarian Adminr.* (1954) 1 All E.R. 969.

Appeals under clause 15 of the Letters Patent against the Order of the Honourable Mr. Justice Ramaprasada Rao, dated 17th August, 1972 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition Nos. 1259 and 1260 of 1971 presented under Article 226 of the Constitution of India to issue (1) a Writ of *certiorari* calling for the records in Case No. CEP/Madras/Salem/Judl. 29 on the file of the 1st respondent herein and the order on the file of the first respondent herein transferring the cash balance of the evacuee Abdul Gani Jan Mohamed from the custody of the 1st Respondent herein and quash: (1) the order dated 2nd November, 1968 in Case No. CEP/Madras/Salem/Judl. 29 of the first Respondent herein; (2) the notifications dated 24th February, 1961 No. F.L. (1216) 58 Comp. III/Prop. of the Ministry of Rehabilitation; and (3) the order transferring the cash balance of the evacuee Abdul Gani Jan Mohamed from the custody of the 1st Respondent therein in W.P. No. 1259 of 1971 (2) a writ of *mandamus* directing the 1st respondent herein to recall the monies of the evacuee Abdul Gani Jan Mohamed and the sale proceeds of the property situate at 20, Ggodown Street, Madras, from the 2nd Respondent therein and return a sum of

*W.A. Nos. 68 and 301 of 1973. 13*th December*, 1974.

Rs. 2,40,000 with interest thereon to the petitioner under section 10 (1) read with section 10 (2) (*n*) and under section 10 (1) read with section 10 (2) (*m*) and rule 22 of the Administration of E.P. Act and Administration of E.P. (Central) Rules refused by order dated 2nd November, 1968 in Case No. CEP/ Madras/Salem/Judl. 29 in W.P. No. 1260 1971.

V. K. Thiruvenkatachari for *V. Sridevan* and *G. Masilamani*, for Appellant.

K. Parasaran, Senior Standing Counsel, for Central Government, for Respondents.

The Judgment of the Court was delivered by

Natarajan, J.—These appeals arise out of Writ Petitions Nos. 1259 of 1971 and 1260 of 1971 respectively, wherein the petitioner-appellant sought writs, one of *certiorari* to quash the orders of the first respondent relating to the transfer of certain cash balances belonging to an evacuee by name Abdul Gani Jan Mohamed and the notification of the second respondent in connection therewith and the other, a writ of *mandamus* to direct the first respondent to recall the moneys of the said evacuee and the sale proceeds of his property from the second respondent and return a sum of Rs. 2,40,000 with interest thereon. Ramaprasada Rao, J., declined to grant either of the writs, though he held that the petitioner was entitled to the money claimed by her from out of funds, if any, possessed by the Custodian and her right to secure a refund still survived.

2. This unfortunate case has a long history, but most of the facts are not in controversy. On 29th April, 1949, the appellant, a permanent citizen of India, purchased an item of property, to wit Gani Market situate at No. 20, Godown Street, Madras-1, for a sum of Rs. 2,40,000. Admittedly, the property belonged to one Abdul Gani Jan Mohamed who had left for Pakistan soon after partition and the sale transaction was negotiated through his power of attorney agent. Some delay was encountered in the registration of the sale deed in connection with the production of income-tax clearance certificate of the vendor. But, ultimately, the sale deed was registered on 11th August, 1949. Ordinance XII of 1949 was promulgated on 13th June, 1949 and it was extended to Madras on 23rd August, 1949. Ordinance XII of 1949 was repealed by Ordinance XXVII of 1949 which, in turn, was repealed by the Administration of Evacuee Property Act (Central Act XXXI of 1950). As may be seen from the facts above, the sale deed was registered even before Ordinance XII of 1949 was extended to Madras. Notwithstanding this feature, the sale required confirmation by the Custodian of Evacuee Property under section 40, as Act XXXI of 1950 had retrospective effect. An application by the appellant to the Assistant Custodian for confirmation was rejected and further agitations to the appellate and revisional authorities were equally unsuccessful. Lastly, the appellant resorted to the Supreme Court in appeal, but in *Rabia Bai* v. *C. G. of E. Property*[1], the Supreme Court declined to interfere, stating that want of good faith in the vendor was, by itself, sufficient to refuse confirmation of sale.

3. Even during the pendency of her appeal before the Supreme Court, the appellant, by way of abundant caution, had recourse to rule 22 of the Administration of Evacuee Property (Central) Rules, 1950 (hereinafter referred to the Rules) for registration of her claim for the return of the sale consideration of Rs. 2,40,000 and the claim was registered by the Assistant Custodian on 1st October, 1954. After the dismissal of the appeal by the Supreme Court, the appellant reiterated her claim for refund, but was sent a reply dated 1st August, 1966 that rule 22 of the Rules had been deleted by Act XCI of 1956 and consequently, no claim by a third party was sustainable.

4. The appellant then filed Writ Petition No. 1901 of 1968 before this Court praying for a direction to the respondents to return to her the sale amount together with interest. During the pendency of the writ petition, the appellant, placing

1. (1961) 3 S.C.R. 448 : (1962) 1 S.C.J. 430: A.I.R. 1961 S.C. 1002.

reliance on *Bhanu Pratap* v. *Assistant Custodian, E.P.*[1], made attempts before the respondents to have her claim considered under section 10 (1) read with sections 10 (2) and 10 (2) (*n*) of Act XXXI of 1950 and rule 22 of the Rules. But they were all of no avail. Finding that the respondents were projecting a new plea to refuse refund to her, *viz.*, that on account of the proceedings under Act XLIV of 1954, the first respondent was not possessed of funds from out of which he could make the refund, the appellant felt that the ground of attack in her writ petition should be widened so as to assail the orders passed under Act XLIV of 1954 and therefore, withdrew Writ Petition No. 1901 of 1968 and came forward with the two writ petitions under appeal.

5. Before Ramaprasada Rao, J., it was contended on behalf of the appellant that after the vesting of the property as evacuee property with the Government, the Custodian had collected appreciable rents and profits arising from the Market for a considerable length of time and had, furthermore, sold the property on 18th January, 1962 for a sum of Rs. 3,10,000 and consequently, the alleged transfer of funds by the Custodian to the Compensation Pool created under Act XLIV of 1954, without an appropriate order from Government under section 14 (1) (*b*) of Act XLIV of 1954 and without making provision for the payment of the appellant's claim for refund which had been registered earlier, was invalid and the order of the Custodian in that behalf should be removed by a writ of *certiorari*. Pausing here, for a moment, it may be mentioned that the Displaced Persons (Compensation and Rehabilitation) Act (XLIV of 1954) was enacted to provide for the payment of compensation and rehabilitation grants to displaced persons and for matters connected therewith. Section 14 therein enunciated the constitution of a Compensation Pool for the purpose of payment of compensation and rehabilitation grants to displaced persons and sub-section (1) (*b*) provided that cash balances lying with the Custodian may, by order of the Central Government, be transferred to the Compensation Pool. It is with reference to this provision, the respondents contended that the cash balances relating to the vendor of the appellant under the impugned sale of the evacuee property had been transferred to the Compensation Pool. Ramaprasada Rao, J., took the view that, having regard to the scheme of Act XLIV of 1954 and the reflection therein of the policy of the Government to rehabilitate displaced persons and the factual materials placed by the respondents to prove the transfer of the cash balances with the Custodian to the Compensation Pool, it was not open to the appellant to assail the transfer of funds or any orders passed in that behalf and, therefore, the appellant was not entitled to the writ of *certiorari* sought for. He further held that if no writ of *certiorari* lies, no writ of *mandamus* would also lie. In that view, he dismissed both the writ petitions. But, as already stated, he upheld the appellant's claim for refund of the sale price and observed that the appellant was, and still continued to be, entitled to get money from and out of the funds that may subsequently come into the hands of the Custodian.

6. Before adverting to the argument of Mr. V. K. Thiruvenkatachari, learned counsel for the appellant, it may be pointed out that though, at one time, the respondents disputed the appellant's right to seek refund of money on two grounds, *viz.*, (1) deletion of rule 22 by Act XCI of 1956 and (2) transfer of funds from the Custodian to the Compensation Pool, the first of the pleas was not pressed into service in meeting the appellant's case in the writ petitions under appeal. Presumably, this change of attitude was as a result of the decision of the Supreme Court in *Bhanu Pratap* v. *Assistant Custodian, E.P.*[1]. Therein, the Supreme Court held that the words used in section 10 (2) (*n*) of Act XXXI of 1950, empowering the Custodian to pay to "any other person" any sums of money out of the funds in his possession, are not restricted to persons who are members of the family

1. (1966) 1 S.C.J. 228 : (1966) 1 S.C.R. 304 : A.I.R. 1966 S.C. 245.

1. (1966) 1 S.C.J. 228 : (1966) 1 S.C.R. 304 : A.I.R. 1966 S.C. 245.

of the evacuee and that other persons who are entitled to receive money from the evacuee are also included. It further held that power to pay the debts was derived both under clauses (*m*) and (*n*) of section 10 (2) and therefore, the deletion of the provision which authorised the Custodian to pay debts due by the evacuee to any person, from clause (*m*) and of rule 22 setting up the machinery for registration of debts, did not affect the power which is conferred by clause (*n*) of sub-section (2) and also by sub-section (1) of section 10. To appreciate the case of the appellant, it is necessary to make reference to rule 22 of the Administration of Evacuee Property (Central) Rules albeit its deletion by Act XCI of 1956, as it was under that Rule the appellant's claim for refund was originally registered by the Assistant Custodian. The relevant portion of rule 22 is as follows:

"Rule 22—*Claims by third parties*:

(1) Any person claiming the right to receive any payment from any evacuee or from the property of such evacuee, whether in repayment of any loan advanced or otherwise, may present petition to the Custodian for registration of his claim..................

Explanation.—An application under this sub-rule shall lie in respect of a claim for refund of money paid as consideration for the transfer by an evacuee of any property, where such transfer is not confirmed by the Custodian under section 40 of the Act.

(2) (*a*) ....

(i) ....

(ii) ....

(iii) ....

(iv) ....

(*b*) Where such claim is of the nature referred to in the '*Explanation*' to sub-rule (1) and the Custodian holds that the transfer of the property in respect of which the claim is made was a *bona fide* transaction, the Custodian may register the claim or such part thereof as has not been satisfied:

Provided that, in the case of a claim of the nature referred to in the *Explanation* to sub-rule (1), the claim shall be registered only for that amount of money which is proved to have been paid as consideration for the transfer of the property.

(2-A) ....

(3) The mere registration of a claim shall not entitle the claimant to payment and the Custodian may for reasons to be recorded refuse payment............"

7. It was to this Rule the appellant resorted to have her claim for refund duly registered, and the Assistant Custodian, to whom the application was made, did register the claim on 1st October, 1954. It was long thereafter, the Custodian transferred the funds relating to the evacuee property to the Compensation Pool. Mr. V. K. Thiruvenkatachari's contention was that the object of the Government in enacting Act XXXI of 1950 and Act XLIV of 1954, and the scheme of the Acts themselves was not to deprive legitimate claimants getting back money due to them from an evacuee. In projecting this argument, he not only pointed out the provisions contained in clauses (*m*) and (*n*) of section 10 (2) of Act XXXI of 1950, but also the framing of rule 22 under the Rules, and, in particular, the Explanation to sub-rule (1) of the said Rule, which conferred a right on the vendee of a property from an evacuee to seek refund of money paid as consideration if the transfer was not confirmed by the Custodian. He further argued that the deletion of Rule 22 by Act XCI of 1956 cannot have any impact over the situation since the claim had already been registered and, though the registration of the claim would not *per se* confer any right on an applicant to demand refund, yet an applicant, whose claim had been registered, ought not to be left in the lurch by a naive plea that the Custodian had subsequently transferred the funds to the Compensation Pool and therefore the refund could not be made. To lay stress on his contention that the registration of the claim for refund by the Assistant Custodian was an act binding on the Government, the learned

counsel made reference to the decision in *Secretary of State for India in Council* v. *Kasturi Reddi*[1], Therein, this Court held that a grant of land made by an officer was binding on the Crown if the officer was an agent generally or specially appointed by the Governor-in-Council in that behalf and such grant would have the same force as if it had been done by the Governor-in-Council himself. Yet another decision relied on by Mr. Thiruvenkatachari is *Bank Voor Handel* v. *Hungarian Adminr.*[2], wherein it was held that profits earned by the Custodian of enemy property in the course of his dealings with the properties of an enemy vested with him under the Trading with the Enemy Act, 1939 and the Trading with the Enemy (Custodian) Order, 1939 would not attract the incidence of income-tax. The Law Lords held that the Custodian was a servant of the Crown and received the income in the course of his duties and therefore, thee income was immune from tax. The last contention of Mr. Thiruvenkatachari was that, in any event, as pointed out by the Supreme Court in *Bhanu Pratap* v. *Assistant Custodian, E.P.*[3], the deletion of rule 22 cannot have the effect of absolving the Government of its duty to refund the purchase-money paid by a vendee when the sale transaction was subsequently refused confirmation by the Custodian.

8. On a consideration of the matter, we are clearly of the opinion that the contention of Mr. Thiruvenkatachari is well founded. The power given to the Custodian under sections 7 to 9 of Act XXXI of 1950 to notify a property as evacuee property and to have the property vested in himself and take possession thereof, is one coupled with duties, one among which is the obligation created under section 10 (2) (n) to pay any person the sums of money he is found entitled to by the Custodian, out of the funds in his possession. Admittedly, the payment of a sum of Rs. 2,40,000 by the appellant to the evacuee in pursuance of the infructuous sale is not denied or refuted by the respondents. The payment is also not vitiated in any manner as the sale was refused confirmation, not because of want of *bona fides* in the transferee, but on account of want of *bona fides* in the transferor. The respondents, are, therefore, under a statutory obligation to refund to the applelant the sale price paid by her.

9. On behalf of the respondents, however, Mr. K. Parasaran argued that the refund of money to the appellant is irretrievably linked with the availability of funds with the Custodian and as, in the instant case, all the available funds with the Custodian had been transferred to the Compensation Pool the respondent cannot be compelled to pay the money to the appellant. In support of this argument, Mr. Parasaran pointed out the words "out of the funds in his possession" occurring in section 10 (2) (1). Even with regard to *Bhanu Pratap* v. *Assistant Custodian, E.P.*[1], Mr. Parasaran sought to make a distinction by contending that the direction given to the Custodian was "to settle the claim of the applicant from out of the funds in his possession" and therefore, any direction by the Court to the Custodian for refund of money to a claimant cannot be delinked from the possession of funds by the Custodian. We are clearly unable to appreciate the contention of Mr. Parasaran and sustain the restriction sought to be placed by him upon the right of a lawful claimant no get refund from the Custodian. The occurrence of the words, "out of the funds in his possession" in section 10 (2) (1) can only mean the availability of the funds of that particular evacuee against whom or against whose property the applicant for refund has a claim. Even Act XLIV of 1954 which conceived and provided the setting up of a Compensation Pool did not contemplate transfer of funds in entirety by the Custodian to the Pool irrespective of claims laid against an evacuee or his property. The words used in section 14 (1) (*b*) are "such cash balances", and not the total cash or the cash in its entirety. The word, "balance"

1. (1903) I.L.R. 26 Mad. 268 : 12 M.L.J. 453.
2. (1954) 1 All E.R. 969.
3. (1966) 1 S.C.J. 228 : (1966) 1 S.C.R. 304: A.I.R. 1966 S.C. 245.

1. (1966) 1 S.C.J. 228 : (1966) 1 S.C.R. 304 : A.I.R. 1966 S.C. 245.

has a distinct connotation and is always understood as the difference between the debit and credit side of an account or their remainder or the difference between the amount which two parties owe each other. As a matter of fact, the communication under which the Custodian took umbrage for transferring the funds of the evacuee to the Compensation Pool, made reference to the transfer of only the surplus balances to the Deputy Accountant General, New Delhi. It is significant to note that what could be transferred consequent upon the abolition of the personal deposit account of Custodian to the Compensation Pool can only be surplus funds, and not the funds in their entirety. The word, "surplus" undoubtedly means, that which is left over or remainder of excess over what is required. The Custodian, therefore, had neither the power nor the authority to transfer the entirety of the funds to the Compensation Pool. What can be transferred to the Compensation Pool can only be the remainder or the balance or the surplus, that is, after the Custodian discharges his obligations to claimants who are legitimately entitled to sums of money from the fund or assets of an evacuee. *A fortiori* it follows that the third respondent was not entitled to direct the Custodian to transfer the entirety of the funds relating to the property of the evacuee, Abdul Gani Jan Mohamed without paying the appellant the sum of money she is entitled to. In such circumstances, we are unable to share the view of Ramaprasada Rao, J., that, for want of funds in the hands of the Custodian, the appellant, though entitled to get a refund of her money, should, for the present, be satisfied with a declaration of her entitlement to the claim and await the collection or accumulation of funds by the Custodian in future.

10. In the view, we have taken, of the matter, it is unnecessary to issue a writ of *certiorari* and quash the orders and notifications impugned in Writ Petition No. 1259 of 1971. The claim of the appellant can be effectively met by issuing a writ of *mandamus* directing the first respondent to refund the sum of Rs. 2,40,000 the appellant is entitled to consequent on the Custodian's not confirm the sale in her favour and to further direct the third respondent to place at the disposal of the first respondent the said sum for the purpose of refund. Time for payment three months.

11. In the result, Writ Appeal No. 101 of 1973 will stand allowed with costs. Counsel's fee Rs. 250. Writ Appeal No. No. 68 of 1973 will stand dismissed, without costs.

S.J. —— *W.A. No.* 101 *of* 1973 *allowed.* *W.A. No.* 68 *of* 1973 *dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*G. Ramanujam, J.*

The Management of M. Jeewanlal (1929) Limited, Proprietors of Mysore Premier Metal Factory, Madras .. *Petitioner**

v.

The Presiding Officer, Industrial Tribunal, Madras-1 and others *Respondents.*

(*A*) *Industrial Disputes Act* (*XIV of* 1947), *section* 25-*FFF*—"*Undertaking*"—*Meaning of*—*Rolling mill section*—*Whether separate undertaking*—*Closure of undertaking*—*Non-employment of workers*—*Whether amounts to retrenchment.*

(*B*) *Industrial Disputes Act* (*XIV of* 1947), *section* 25-*FFF*, *sub-section* (1) *proviso*—"*On account of unavoidable circumstances beyond the control of the employer*"—*Scope*—*Company not bound to replace sophisticated machine at huge cost to provide employment to the workmen.*

The word "undertaking" has not been defined in the Industrial Disputes Act, though it defines "industry" as any business, trade, undertaking, manufacture or calling of employees and includes any calling service, employ-

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*W P. Nos. 1419 and 3281 of 1971. *25th February,* 1975.

...afts or industrial occupament, association of workmen. Section 25FF provides for compensation to workmen in case of closing down of undertaking. Having regard to the definition of industry, it is not possible to equate undertaking within industry. [*Para.* 12]

The transfer of a portion of an undertaking does not stand on the same footing as the closing down of a portion of an undertaking. A closure of a part of an industrial undertaking is permissible. Therefore, even if the rolling mill section is not a separate undertaking still the rolling mill section as an independent and separate unit of the main undertaking can be closed. Without the rolling mill section, the utensils—making section could carry on and therefore the non-employment of the workers in the instant case was as a result of the closure of the rolling mill and it is not a case of retrenchment. [*Para.* 14]

The circumstances such as the nature and condition of machinery which can only produce substandard products by the company and the prohibition by the State of the manufacture in future of such sub-standard products which cannot conform to the I. S. I. standard and the difficulty in making those sub-standard products in a competitive market where products manufactured by some modern sophisticated mills are available have to be taken to be unavoidable circumstances beyond the control of the company. The employer is not compelled by the statute to involve himself in unusual exertion or expenses with a view to avoid any particular circumstance necessitating the closure of the business. [*Para.* 16.]

Cases referred to :—

Radio and Electricals Ltd. v. *Industrial Tribunal*, (1970) 2 L.L.J. 206; *Hotel Ambassador* v. *Its Workmen*, (1963) 2 L.L.J. 87; *Hindustan Steel Limited* v. *Their Workmen*, 43 F.J.R. 192; *Workmen of Indian Leaf Tobacco Development Company Limited* v. *Management*, (1970) 37 F.J.R. 231: (1970) 1 S.C.J. 465: (1969) 2 S.C.R. 282 : (1970) 1 An.W.R. (S.C.) 94 : (1970) 1 M.L.J. (S.C.) 94: A.I.R. 1970 S.C. 860 ; *Parry and Company Limited* v. *Second Industrial Tribunal, Calcutta*, (1970) 38 F.J.R. 164 : (1969) 2 S.C.R. 976: (1970) 2 S.C.J. 433 : A.I.R. 1970 S.C. 1334 ; *Workmen* v. *Straw Board Manufacturing Company*, (1974) 2 S.C.J. 115: A.I.R. 1974 S.C. 1132; *Pakshiraja Studios* v. *Its Workmen*, (1961) 1 L.L.J. 380; *The South India Mill Owners' Association* v. *Coimbatore District Textile Workers' Union*, A.I.R. 1962 S.C. 1221; *R. S. Madho Ram and Sons (Agencies)* v. *Its Workmen*, (1964) 1 L.L.J. 366 : (1964) 5 S.C.R. 379 : A.I.R. 1964 S.C. 645 ; *Bhattacharjee Rubber Works* v. *B. R. W. W. Union*, (1960) 2 L.L.J. 198 : 64 Cal.W.N. 694 : A.I.R. 1960 Cal. 356; *Hathising Manufacturing Company and others* v. *Union of India*, (1960) 2 L.L.J. 1 : (1960) 3 S.C.R. 528: A.I.R. 1960 S.C. 923 ; *Kalinga Tubes* v. *Their Workmen*, (1969) 1 S.C.J. 671: (1969) 1 L.L.J. 557: A.I.R. 1969 S.C. 90.

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavits filed therewith, the High Court will be pleased to issue writs of *certiorari* calling for the records relating to D.D. No. 92 of 1968 on the file of the first respondent in both the petitions and (*i*) quash the award made therein on 10th February, 1971 by the first respondent and published in Tamil Nadu Gazette, dated 31st March, 1971 Supplement to Part II, section 1 (in W.P. No. 1419 of 1971) and (*ii*) quash the award so as to grant the relief of reinstatement of the workmen or alternatively the compensation against nonemployment or for loss of employment as prayed for by the petitioner before the first respondent (in W.P. No. 3281 of 1971).

V. P. Raman, for *King* and *Patridge*, for Petitioner in W.P. 1419 of 1971. and

Second Respondent in W.P. 3281 of 1971.

S. Ramaswamy, for *K. S. Janakiraman* and *K. S. Mahadevan*, for Respondent.

The Court made the following

ORDER.—As both the writ petitions arise out of the same award of the Industrial Tribunal, they are dealt with together.

2. The petitioner in the first case is the management and they challenge that portion of the award which is against them. The workmen have filed W.P. No. 3281 of 1971 challenging that portion of the award which is adverse to them.

3. A partnership firm called "The Mysore Premier Metal Factory" was carrying on business of manufacture in aluminium utensils and other articles from the year 1939. In or about 1945, in order to facilitate its business of manufacture, it purchased the Hindustan Metal Refinery and Rolling Mills. The Government of India gave separate registration numbers for the rolling mills purchased as well as for the undertaking owned by the firm for manufacturing utensils. In or about the year 1965 the management of Jeewanlal (1929) Limited, hereinafter referred to as the company, purchased the two undertakings owned by the Mysore Premier Metal Factory and the change of ownership was recognised by the Government of India separately for the rolling mills and the utensils manufacturing section under the Industries (Development Regulation) Act, 1951. After such acquisition it was found that the machinery and the equipment in the rolling mills were far from trouble-free and required repairs, overhauling and replacement. The working of the rolling mill ever since the purchase by the company resulted in the output being of extremely poor quality which had no market. In or about 1968 the machinery in the rolling mills is said to have become unworkable and the manufactured stocks accumulated to a value of Rs. 10 lakhs. Even though services of experts were requisitioned to suggests ways and means to make the running of the rolling mills worthwhile and remunerative it was found that even if the repairs were carried out at a considerable cost, the quality of the manufactured goods would not improve. Thereafter the company decided to close down the rolling mills which they did by a notice dated 14th October, 1968. Along with that notice, the company also sent individual notices to each worker offering closure compensation, limiting it to three months under the proviso to section 25-FFF on the basis that the closure was on account of unavoidable circumstances beyond the control of the company.

4. Consequently on the closure of the rolling mills, the union of workers, the petitioners in W.P. No. 3281 of 1971 raised an industrial dispute challenging the validity of the closure in I.D. No. 92 of 1968. As the names of three workmen who had been employed in the rolling mills had been omitted in the first reference, a second reference relating to the non-employment of these three workers was made in I.D. No. 61 of 1969.

5. The Union, in its claim statement filed before the Industrial Tribunal, contended that the rolling mills was not a separate undertaking and as such it was not a case of closure but retrenchment, that the condition precedent to retrenchment as laid down in section 25-F of the Industrial Disputes Act had not been complied with by the company and therefore the non-employment of the workmen of the rolling mills and the termination of their services were illegal and invalid. It was also contended that the company had contravened the rule of "last come first go" laid down in section 25-G of the Act in effecting the retrenchment and that the termination of their services was illegal on this ground as well. The Union alternatively contended that even, assuming that the termination of the employees was as a result of the closure the company would not be entitled to limit the compensation to three months but would be bound to pay the entire compensation under section 25-FFF.

6. The Company in its counter-statement took up the stand that the rolling mills was a separate undertaking, that it was clearly a case of closure of that undertaking due to unavoidable circumstances beyond its control, that as the statutory obligation to pay the three months' compensation had already been complied with in that the petitioner company had offered the compensation to all the workers affected by the closure, no further question could arise in respect of their non-employment. The Company further contended that the 67 workers

had in fact received the compensation for three months offered to them and settled their accounts fully and finally, and that in respect of those workers there could be no subsisting dispute. The Company further contended that on the wording of the reference by the Government once the Tribunal finds that it is a case of closure and it is justified, it cannot go into the question as to whether the closure is due to unavoidable circumstances beyond the control of the company.

7. On these pleadings, the Tribunal, after recording the evidence of the witnesses and after considering the relative contentions of parties with reference to the entire evidence passed a common award in both I.D. Nos. 92 of 1968 and 61 of 1969. It found as a fact that the rolling mills was a separate undertaking and that, therefore, it was a case of closure of an undertaking and not a case of retrenchment. It also found that the closure was due to the financial losses and breakdown of the machinery and that, therefore, the closure of the rolling mills was justified. It, however held that the closure being due to the financial losses and accumulation of stocks, it cannot be said to be due to circumstances beyond their control, that the compensation payable to the workmen cannot be limited to 3 months, and that they are entitled to the entire compensation as laid down in the main part of section 25-FFF. It also negatived the Company's contention that the 67 workers having received three months' compensation in full and final settlement, they are estopped from reagitating their claims, and held that as the 67 workers had received compensation payable to them at a time when the dispute was pending consideration before the Tribunal, they cannot be estopped from claiming the amount legally and legitimately payable to them under the statute.

8. The Union is aggrieved against the finding given by the Tribunal that the rolling mills is a separate undertaking and that therefore, it is a case of closure and not retrenchment. The management on the other and, is aggrieved against the finding of the Tribunal that the closure of the rolling mills was not due to circumstances beyond the control of the company and that the 67 workmen who have received three months' compensation due to them under the proviso to section 25-FFF are not estopped from claiming a higher compensation due to them under the main part of section 25-FFF.

9. Having regard to the contest between the parties in the above writ petitions, the points that arise for consideration are: (1) Whether the rolling mills is a separate undertaking; (2) If the rolling mills is a separate undertaking, whether its closure was due to circumstances beyond the control of the company so as to attract the proviso to section 25-FFF; and (3) whether the 67 workers who had accepted the three months' compensation from the company pending the reference before the Tribunal is estopped from claiming higher compensation under section 25-FFF.

10. The question whether the rolling mills is a separate undertaking is the most crucial question for on it will depend the other questions. If the rolling mills is a separate undertaking then the non-employment of 169 workers can be said to be due to the closure of the rolling mills and the workmen will then only be entitled to the closure compensation as provided either under the main part of section 25-FFF or the proviso thereto. But if the rolling mills is not a separate undertaking, then the non-employment of the workmen will have to be held unjustified as the company has not followed the rule of "last come first go" provided in section 25 (G) and the offer of three months' compensation under the proviso to section 25-FFF (1) cannot be taken to be a due compliance with the procedure for retrenchment under section 25-F.

11. As already stated, the Tribunal has held that the rolling mills is a separate undertaking by itself and the factors that are taken by the Tribunal in support of that finding are these: The industrial licences were separate for the utensils department and the rolling mills department. The two departments always existed as separate departments. The

rolling mills department was housed at No. 61, Gollavar Agraharam Street, and the utensils department was carried on at No. 7, Thandavaraya Gramani Street, where the work of pressing, blending, cutting, fitting and polishing were carried on and the work of washing and packing were done in No. 77, Gollavar Agraharam Street. Though at all times there was only one union of workmen for all the departments, there were separate joint secretaries for the union for each of the three departments. Though the factory licence was common for all the three units and the management was common and a common balance-sheet was prepared for the entire factory and a single standing order existed covering all the workers, the union always took up the stand that the departments were separate departments and no inter-departmental transfer of workmen could be made from the rolling mills section to any other section. No production work was normally carried on in the rolling mills section and the work done in each department was different. Though the circles made in the rolling section were out and fitted in the other sections, that cannot mean that the other sections were not turning out work different from the rolling mills section. The work done in the rolling mills section is independent of the work of manufacture of utensils, though the ingots produced in the rolling mills are used for the manufacture of utensils in the other sections. Thus the rolling factory is not an integral part of the other departments. The ingots and circles required for manufacturing utensils could be got from elsewhere and the utensils manufacturing process could be continued without the rolling mills as the company has been doing before 1965 when they purchased the rolling mills in question. There is no reason for mixing up the rolling mills where manufacture of ingots is done and the manufacture of utensils in the other sections. Thus rolling mills is independent of the other departments. There were separate wage registers and attendance registers for the rolling mills and other sections. The rolling mills had a separate premises with a separate Works Manager. The workmen in the rolling mills section were entitled to incentive bonus while the workmen in the other sections were not so entitled. There is no controversy between the parties as to the above factual position. The question is whether on these factors, the rolling mill section could be held to be a separate undertaking as has been held by the Tribunal.

12. The word "undertaking" has not been defined in the Industrial Disputes Act though it defines "industry" as any business, trade, undertaking, manufacture or calling of employees and includes any calling, service, employment, handicraft or industrial occupation or avocation of workmen. Section 25-FFF provides for compensation to workmen in case of closing down of undertaking. Having regard to the definition of industry, it is not possible to equate undertaking with industry. In *Radio and Electricals Limited* v. *Industrial Tribunal*[1], Alagiriswami, J., had dealt with a case where the mechanical section of an industrial concern was closed down and the question arose as to whether it was a case of closure of an undertaking under section 25-FFF or whether it was a case of retrenchment under section 25-F. The learned Judge, after referring to certain earlier decisions on the point expressed the view thus :

> " I am of the opinion therefore that this is a case of permissible closure of part of the business of the petitioner company and consequently retrenchment compensation is payable under section 25-FFF and not under section 25-F, and such being the case, the payment of the benefits due to the workers is not a condition precedent....."

In *Hotel Ambassador* v. *Its Workmen*[2], this Court held that the closure of a part of an undertaking was permissible.

13. In *Hindustan Steel Limited* v. *Their Workmen*[3], the Supreme Court had held that the word " undertaking " in section 25-FFF (1) of the Industrial Disputes Act, is used in its ordinary sense connoting thereby any work, enterprise, project or

1. (1970) 2 L.L.J. 206.
2. (1963) 2 L.L.J. 87.
3. 43 F.J.R. 192.

business undertaking and it is not intended to cover the entire industry or business of an employer and that, therefore, the closure or stoppage of a part of the business or activities of an employer would be covered by the section. The Supreme Court had referred to two of its earlier decisions in *Workmen of Indian Leaf Tobacco Development Company Limited* v. *Management*[1], where the closure of eight out of the twenty-one depots of the company was held to be a closure within the meaning of section 25-FFF (1) and *Parry and Company Limited* v. *Second Industrial Tribunal, Calcutta*[2], where it was observed that it was within the managerial discretion of an employer to organise and arrange his business in the manner he considers best and that if a *bona fide* scheme for such re-organisation results in surplusage of employees, no employer is expected to carry on the burden of such economic dead-weight and retrenchment has to be accepted as inevitable, however, unfortunate. In *Workmen* v. *Straw Board Manufacturing Company*[3], which appears to be the latest decision on the point, certain tests had been laid down to find out when various units will constitute one establishment. In that case two units, the straw board mill and the Regmal Mill were owned by the Straw Board Manufacturing Company. The Straw Board mill was closed while the other mill continued to function. The question was whether the closure of one unit will attract section 25-FFF. It was held by the Supreme Court that the most important aspect in a case of closure is to see whether one unit has such a componental relation with the other, whether the closing of one must lead to the closing of the other, or one cannot reasonably exist without the other and whether it is functionally integrated with the other. If the other unit is capable of functioning in isolation without the other it is of very material import in the case of closure, though there is bound to be a shift of emphasis in application of the various tests from one case to another. It referred to the test of functional integrality laid down in *Pakshiraja Studios* v. *Its Workmen*[1], and the test of unity of ownership and management and control laid down in *The South India Mill Owners' Association* v. *Coimbatore District Textiles Workers' Union*[2], and stated that the significance of the several relevant factors would not however be the same in each case. Mr. V. P. Raman, learned counsel appearing for the company relies on the above decisions of the Supreme Court and contends that the rolling mill is not functionally integrated to the other sections and that even if the rolling mills is closed, the utensils manufacture can go on without interruption. He states that the rolling mills can be closed by the management without reference to the other sections, and the motive of the employer is not relevant for finding out whether the closure of the rolling mills will come under section 25-FFF.

1. (1970) 37 F.J.R. 231 : (1970) 1 S.C.J. 465 : (1969) 2 S.C.R. 282 : (1970) 1 An.W.R. (S.C.) 94 : (1970) 1 M.L.J. (S.C.) 94: A.I.R. 1970 S.C. 860.
2. (1970) 38 F.J.R. 164 : (1969) 2 S.C.R. 976: (1970) 2 S.C.J. 433 : A.I.R. 1970 S.C. 1334.
3. (1974) 2 S.C.J. 115 : A.I.R. 1974 S.C. 1132.

14. Mr. Ramaswami, learned counsel appearing for the workmen, on the other hand, contends that the rolling mill is not a separate undertaking and that the case is governed by the principle laid down by the Supreme Court in *R. S. Madho Ram and Sons (Agencies)* v. *Its Workmen*[3]. According to the learned counsel the company had purchased in 1965 the entire concern called "Mysore Premier Metal Factory" which had the rolling mills section as well as the utensils manufacturing section, that therefore it is not possible to separate the two units owned by the same management as rolling mill section and the utensils manufacturing section, that in fact there were certain instances of transfer from the rolling mills section to other sections even though it was resisted by the workers and that all the workmen are governed by the common standing orders. *R.S. Madho Ram and Sons (Agencies)* v. *Its Workmen*[3], dealt with a case of a transfer of workman from one unit to another under the same management coming under section 25-FF. In that case it was held that section 25-FF would

1. (1961) 2 L.L.J. 380.
2. A.I.R. 1962 S.C. 1221.
3. (1964) 1 L.L.J. 366: (1964) 5 S.C.R. 379: A.I.R. 1964 S.C. 645.

not apply if a transfer is made from one department or branch to another which are integrated or inter-related and that to find out whether there are two distinguished and separate businesses, it may be necessary to see whether the muster roll or the conditions of service are common and whether the employees are transferred from one unit to another belonging to the transferor. The learned counsel construes the above decision as laying down that the most significant test is the test of transferability of the employees from one department to another and in this case though the workers resisted there was in fact one instance of transfer as between the rolling mill section and the utensils-making section. I do not think that the above decision will apply to the facts of this case. In that case the question for consideration was whether the transfer of a part of an undertaking would attract section 25-FF. The transfer of a portion of an undertaking does not stand on the same footing as the closing down of a portion of an undertaking. It has been consistently held that the closure of a part of an industrial undertaking was permissible. Therefore, even if it is held that the rolling mill section is not a separate undertaking still the rolling mill section as an independent and separate unit of the main undertaking can be closed. Without the rolling mill section the utensils-making section could be carried on and is in fact being carried on by the company both before the acquisition of the rolling mill and after its closure. I have to, therefore, hold that the non-employment of the workers was as a result of the closure of the rolling mill and that it is not a case of retrenchment as contended by the workmen.

15. As regards the second question as to whether the closure was "on account of unavoidable circumstances beyond the control of the employer" so as to attract the proviso to section 25-FFF (1) the Tribunal has taken the view that the closure was not due to unavoidable circumstances beyond the control of the company. But on the facts, I am not inclined to accept the view of the Tribunal. The case of the company is that the rolling mills purchased by them in 1965 consisted of machineries which were old and worn out, that all efforts taken to set right the same had failed and that even if the machinery could be set right the sub-standard articles produced cannot have a market at all in the face of the products manufactured by the rolling mills having latest, up-to-date and sophisticated machinery. It is because of that reason the company is said to have accumulated large stocks which could not be marketed. The Tribunal, while accepting the case of the management that the machinery in the rolling mills was out-dated and that there has been financial loss due to accumulation of stocks, proceeds to state that the company having purchased an out-dated and old machinery should have taken steps to repair the existing machines or replace the same by new machinery but it went on getting work from the machinery as a result of which the machinery was getting worn out and becoming useless for any further operation. It therefore took the view that the closure of the rolling mills was not due to circumstances beyond the control of the company. The question is whether the view taken by the Tribunal that the company should have replaced the worn-out machinery long earlier and by the continued working of the out-dated machinery the company placed itself in a position that it cannot work profitably is justified. I am not inclined to agree with this view of the Tribunal that the company should have replaced the out-dated machinery by new and sophisticated machinery at a considerable cost as to see that the rolling mill continues to run and that because of its failure to do so it cannot claim that the closure was due to circumstances beyond their control. The documents produced in the case show the very many attempts made by the company to rectify the defects in the machinery of the rolling mills and it is only when all their attempts failed to produce any substantial results, they decided to close the rolling mills. It is also seen that the company took the services of certain experts in the field and they had reported that even after repairs and replacement of some machinery the rolling mills cannot work profitably as the entire machinery was obsolete and that to make the working of the rolling mills profitable the entire machinery

should be replaced with new modern high speed ones. One of such reports is contained in Exhibit M-10, dated 16th September, 1968. From the said report it is seen that the rolling mills had been working for half a century, much more than the lifetime of similar mills, that it is very uneconomical and risky to work it any further, that notwithstanding the repairs done several times in the past to the machinery, the continued running of the rolling mills is not possible unless there is a complete re-machining and realignment and that the damages to the existing machinery were so extensive in nature that unless the rolling mills is stopped and the machineries dismantled it may result in a serious break-down involving risk and danger to men and machinery. The report further states that even if the existing damages to the machinery are rectified, it will produce only sub-standard products as it has been doing since many years. From the report it is also clear that the main shaft and the gear box etc., were dismantled for the purpose of effecting repairs but it was found after dismantling that the condition of those machineries were such that even after their repairs they are likely to give constant trouble in operation leading to frequent break-down as a result of the worn out condition of most of the component parts of wooden gearing, couplings, main rolling stand guides etc. In answer to query from the company whether the products of the rolling mills even after complete overhauling and repairs at a considerable cost, will conform to Indian Standards for rolled products to be used for manufacturing utensils, the report says that since the erection of the mill with slow-speed machinery and its working for over half a century, the technology and techniques have advanced so considerably that the new high-speed machinery erected in modern rolling mills produce materials in much larger quantities at a very fast rate which alone can conform to the standards drawn by I.S.I., and that even after considerable repairs at heavy cost the rolling mill of the company could not produce materials conforming to I.S.I. standards. In Exhibit M-11 which is a report given by the MadrasAluminium company limitedwhose services were also requisitioned to rectify the defects in the machinery the Company had reported that it is apparent that normal wear coupled with operation of the equipment in a mechanically unsatisfactory condition have resulted in a situation where it appears inadvisable to attempt to repair this equipment, and that even if the equipment is restored to a mechanically workable condition, it will have a very low productivity and the quality of the products—circles for utensils manufacture will also be poor, as the installed machinery is out-dated and has outlived its usefulness. There is also one other factor which is crucial which has not been referred to by the Tribunal. In Exhibit M-7 the Government of India had specifically pointed out that as the aluminium utensils are being used for domestic purposes, it is considered dangerous to health if sub-standard materials are used in the manufacture of utensils which are declared as essential commodity under the Essential Commodities Act, 1955, that in order to safeguard against health hazards of the users of aluminium utensils, the manufacturers of aluminium sheets should adhere to the I.S.I. specifications to ensure that the aluminium sheets used for the manufacture of utensils should be of the prescribed specifications. This direction taken along with the experts' report in Exhibit M-10 show that the company cannot continue to produce sub-standard material as they have been doing before and that the company will be committing an offence under the Essential Commodities Act if it produced sub-standard products by working the rolling mills. From the facts set out above, it is clear that unless the rolling mill is modernised by replacing the existing machinery with the latest, upto-date and sophisticated machinery at a huge cost it was not possible to work the mill profitably or without offending the law. The question is whether the company is bound to do so for providing continued employment to the workmen.

16. In *Bhattacharjee Rubber Works* v. *B.R.W.W. Union*[1], the Calcutta High Court dealing with the scope of the expression "unavoidable circumstances beyond the control of the employer" in

1. (1960) 2 L.L.J.198 : 64 Cal.W.N. 694: A.I.R. 1960 Cal. 356.

the proviso to sub-section (1) of section 25-FFF expressed the view that all that the employer is required to do is to use ordinary diligence, that he is not called upon to make any special efforts to avoid the circumstances leading to the closure that an employer is entitled to run his business in a normal manner meeting emergent situations and applying normal remedies but that he is not called upon to take extraordinary measures or incur extraordinary expenses in order to continue to run his business. The following observations by Sinha, J., in that case are pertinent :

> "The question is what is the meaning of the words 'unavoidable circumstances beyond the control of the employer'. The idea behind the introduction of section 25-FFF appears to me to be quite clear. If an employer chooses to close his business, there is nothing in the Act preventing him from doing so. If, however, he chooses to do so arbitrarily and without any reasonable cause, then he has to pay compensation to the workmen as if they were retrenched. But if he has to close his business due to unavoidable circumstances beyond his control, then compensation payable will be very much less. It would be observed that there are two pre-conditions to bring the matter within the scope of this section. The closure must be due to circumstances which could not be avoided by the employer, and the circumstances which justify the closure must be such as cannot be controlled by the employer."

In *Hathising Manufacturing Company and others* v. *Union of India*[1], the Supreme Court had held that where the closure is merely on account of financial difficulties or accumulation of undisposed stocks, it cannot be said to be due to circumstances beyond the control of the employer, for such factors may be temporary and may be brought about by mismanagement, deliberate or otherwise, directly attributable to the employer. But in assessing whether the circumstances for the closure were beyond the control of the employer the fact that the employer has suffered financial losses or there is accumulation of stocks cannot be excluded from consideration and if the closure is not merely due to financial difficulties or temporary accumulation of stocks but also due to causes such as unfavourable market conditions and impossibility of making any profit in future etc., that may justify the view that the closure is due to unavoidable circumstances beyond the control of the employer. In *Kalinga Tubes* v. *Their Workmen*[1], the Supreme Court had laid down that wherever there is a closure of an undertaking the burden is on the undertaking to bring the case within the proviso to section 25-FFF and to prove that the circumstances were unavoidable and were beyond the control of the company for closing down the undertaking, that except in cases where the working of the factory would involve unusual exertion or expenses and it is impossible for the management to continue the working of the factory in the prevailing circumstances, the closure cannot be said to be beyond the control of the employer. The Supreme Court observes :

> "The explanation appearing in the proviso gives some indication of the anxiety of the Legislature to expressly rule out certain contingencies which ordinarily could have been pleaded by the employer as unavoidable circumstances beyond his control. In the normal working of business of a commercial undertaking financial losses or accumulation of undisposed of stocks and the expiry of the period of the lease or the licence can ordinarily go a long way in establishing that it has virtually became impossible to carry on the business. For instance, if a company is, heading towards liquidation, its business will, in normal course, have to be closed down. Similarly if the period of lease of the site on which a factory has been set up has expired and there is no provision for its renewal or extension, it would ordinarily present insurmountable difficulty in the way of the working of an undertaking by a company or a commercial concern. Notwithstanding

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1. (1960) 2 L.L.J. 1 : (1960) 3 S.C.R. 528: A.I.R. 1960 S.C. 923.

1. (1969) 1 L.L.J. 557 : (1969) 1 S.C.J. 671: A.I.R. 1969 S.C. 90.

all this the Legislature provided that in spite of the aforesaid difficulties or impediments or obstacles the conditions of the proviso would not be satisfied merely by the happening or existence of the circumstances embodied in the explanation. The reason for doing so seems to be that whenever such difficulties, as are mentioned in the explanation, arise, the employer is not expected to sit idly and not to make an all-out effort like a prudent man of business in the matter of tiding over these difficulties for saving his business. The Legislature was apparently being very stringent and strict about the nature of the circumstances which would bring them within the proviso. The laying down of two pre-conditions therein in the language in which they are couched is significant and must be given due effect."

In view of the above pronouncement by the Supreme Court the circumstances such as the nature and condition of the machinery which can only produce sub-standard products by the company and the prohibition by the State of the manufacture in future of such sub-standard products which cannot conform to the I.S.I. standards and the difficulty in marketing those sub-standard products in a competitive market where products manufactured by some modern sophisticated mills are available, have to be taken to be unavoidable circumstances beyond the control of the company. I am not inclined to agree with the learned counsel for the workmen that as a prudent employer, the company should have avoided the situation by replacing the old and worn-out machinery by more modern and sophisticated machinery by the use of the amount of depreciation and other allowances allowed under the Income-tax Act. The employer is not compelled by the statute to involve himself in unusual exertion or expenses with a view to avoid any particular circumstance necessitating the closure of the business. The facts proved in this case clearly establish that the matter has gone out of the company's hands and that even with ordinary and due diligence the machinery in the mill cannot be worked profitably. For the foregoing reasons I cannot agree with the view taken by the Tribunal that the closure of the rolling mills will not fall under the proviso to section 25-FFF (1). The company is, therefore, entitled to invoke the proviso to section 25-FFF (1).

17. In view of the fact that the workmen have been held to be entitled to compensation under the proviso to section 25-FFF (1) the third question as to whether the 61 workers who have received payment of compensation as per the proviso are entitled to claim a higher compensation does not arise for consideration.

18. The result is Writ Petition No. 1419 of 1971 is allowed and the rule *nisi* issued therein is made absolute. Writ Petition No. 3281 of 1971 is dismissed. There will, however, be no order as to costs in both these petitions.

R.S. *W.P. No.* 1419 *of* 1971 *allowed;*
W.P. No. 3281 *of* 1971 *dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*P. R. Gokulakrishnan, J.*

K. Karuppanna Mudaliar . . *Petitioner**

v.

Kuttianna Mudaliar . . *Respondent.*

Civil Procedure Code (*V of* 1908), *Order* 6, *rule* 17—*Suit for declaration—Decreed—Appeal—Application for amendment of plaint by plaintiff—Dismissed—Revision—Discretion to be exercised by Court.*

A Court cannot shirk its duties because by amendment the pleadings have to be amended and fresh evidence has to be let in. The predominant interest of the Court should be to render justice and allow amendments for such purposes in order to determine the real question in controversy between the parties. [*Para.* 8.]

Cases referred to :—

Subraya Bhatta v. *Govinda Bhat*, (1949) 2 M.L.J. 421 : A.I.R. 1950 Mad. 32 ;

*C.R.P. No. 703 of 1974. 14*th March*, 1975

Mt. Lachmin v. *Bhairan Baksh Singh*, A.I.R. 1940 Oudh. 367; *G. Mc.Kenzie and Company* v. *Tatanlal Surajmall*, A.I.R. 1935 Pat. 463 ; *Ramasaran Mandar* v. *Mahabir Sahu*, (1927) 52 M.L.J. 402 : 54 I.A. 55 : A.I.R. 1927 P.C. 18 ; *Jaini Brothers and Company* v. *Shankar Lal*, A.I.R. 1938 Lah. 270 ; *Apurba Krishna* v. *Ram Bahadur*, A.I.R. 1936 Pat. 191.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Additional Subordinate Judge, Erode, dated 2nd January, 1974 and made in I.A. No. 143 of 1973 in A.S. No. 53 of 1973 (O.S. No. 153 of 1969 D.M.C., Erode).

P. S. Srisailam, for Petitioner.

S. Palaniswami, for Respondent.

The Court made the following

ORDER.—This revision petition arises out of an order refusing to permit the petitioner to amend the plaint and the plan attached thereto. The petitioner herein who is the plaintiff in O.S. No. 153 of 1969 filed the said suit for declaring the plaintiff's right to drain wash water of the kitchen and bath room and rain water falling from the eaves of his house through the vent towards east through the drain, for restraining the defendant, his men, heirs and assigns etc., from interfering with and disturbing in any manner the peaceful enjoyment of the said right by means of a permanent injunction and for directing the defendant to remove the obstruction to the vent on the east and in case the defendant fails to comply with the decree, the same may be removed by Court and the defendant may be made liable for the expenses. Along with the plaint, the petitioner herein filed a plan showing the location of the respective houses of the parties and the vent alleged in the plaint. The trial Court decreed the suit as prayed for. Aggrieved by the decision of the trial Court, the respondent herein preferred A.S. No. 53 of 1973, on the file of the Additional Sub-Court, Erode. While that matter was being argued, the plaintiff, that is the petitioner herein, thought it necessary to amend the plaint since the description of the plaintiff's property and also the plan drawn are not in accordance with the actual state of affairs. It is the case of the plaintiff in the petition for amendment that his house does not extend upto the north to south road on the west and that in between the north-south road on the west and his house, there is a lane and building belonging to one Sengoda Mudaliar. Even the Commissioner appointed by the trial Court points out this mistake. The Commissioner has also filed his plan and report. No objection was taken by the petitioner herein at that time. Nevertheless he has come forward by way of a petition to amend, in I.A. No. 143 of 1973 in A.S. No. 53 of 1973, praying to amend paragraph 4 of the plaint and read the first sentence as follows :—

> "The plaintiff's house is shown as A B C D bounded on the west by the house of one Sengoda Mudaliar and common passage".

It is also prayed that the plaint plans also may be suitably amended. The said petition was contested by the respondent herein stating that it is too late in the day for the plaintiff to amend the plaint, that since the plaintiff has not objected to the Commissioner's plan, he cannot be allowed to overcome the same by way of amendment as prayed for now and that such an amendment will be in the nature of putting up a new case which in all material particulars contradicts the original case put up by the plaintiff.

2. The Additional Subordinate Judge, Erode, observing that such an amendment will involve various other complications and also affect the veracity of the defendant's allegation and also will complicate matters, in that, if the amendment is allowed, naturally the rebuttal pleadings pertaining to this aspect of the case would have to be amended and in that case fresh evidence might have to be let in and fresh issues also might crop up for decision, dismissed the petition. Aggrieved by the said decision, the plaintiff-petitioner has come forward with the abovesaid revision petition.

3. I have been taken through the pleadings in this case and also the affidavit in support of the amendment application : It is patently clear that the plaint plan does not indicate the correct topography

of the plaintiff's house, inasmuch as the Commissioner, in his report, has clearly stated that ABCX portion in his plan belongs to third party, and not to the plaintiff. If that is the state of affairs, a mistake has crept in the plan filed by the plaintiff inadvertently. Such a mistake, in the interests of justice, has to be allowed to be rectified lest the party has to suffer on account of a patent mistake committed by him in the plan attached to the plaint. No doubt, the present amendment goes against the Commissioner's plan in respect of the portion A B C D alleged to be that of the plaintiff in the Commissioner's plan. The plaintiff, by way of amendment, wants to make out that his house portion does not at all touch the mud road on the west. It is always open to the plaintiff to substantiate his contention by way of amendment if he genuinely has a grievance as to the correctness of the plan he has submitted along with the plaint. The Commissioner's plan and report, to a certain extent, go to support the plaintiff's allegation in the application to amend the plaint, though they do not support the plaintiff to the fullest extent. Relying on the report of the Commissioner and also the state of affairs, the learned counsel for the petitioner submits that the Court below has failed to exercise the jurisdiction vested in it in law under Order 6, rule 17, Civil Procedure Code.

4. Thiru Palaniswami, the learned counsel for the respondent, opposed the application for amendment on the ground that the plaintiff had these facts when he filed the plaint and that inasmuch as he has failed to mention the exact boundaries in his plaint, he should not be allowed to amend the plaint and the plaint plan at the appellate stage. The learned counsel cited a number of decisions to support his contention.

5. In *Subraya, Bhatta* v. *Govinda Bhat*[1], the High Court set aside an order allowing amendment made by the lower Court. There, it was held that no doubt subsequent events would give the right to the plaintiff to have the plaint amended, but if he had the facts at the time of filing the plaint and failed to state them originally in the plaint, he cannot be allowed to amend the plaint later. I do not think the facts in that decision are similar to those in the present case, and the principles therein can govern the case on hand. Here is a case where the plaintiff has misstated the real state of affairs and inadvertently filed a plan not revealing the real state of affairs; and having come to know the patent mistake, he wants to correct himself so that justice may be rendered to the respective parties. It cannot be said that new facts are being stated by the plaintiff at the appellate stage by way of amendment. On the other hand, real facts are sought to be stated for the purpose of helping the Court to render justice to the parties concerned.

1. (1949) 2 M.L.J. 421 : A.I.R. 1950 Mad. 32.

6. The other cases relied on are *Mt. Lachmin* v. *Bhairon Baksh Singh*[1], *G. McKenzie and Company* v. *Tatanlal Surajmall*[2] and *Ramsaran Mandar* v. *Mahabir Sahu*[3]. The Oudh High Court held:—

> "The amendments allowed were undoubtedly very drastic and changed the nature of the suit inasmuch as the allegations on which the claim was based were not only changed but contradictory allegations were put in their place and therefore could not be allowed."

To the same effect, are the other two decisions above referred to. I do not think the present case comes under the observations above extracted. There is absolutely no question of changing the nature of the suit or putting contradictory allegations by way of the amendment. In the present case, as far as the vent through which water has to be let out, is concerned, the case has not been changed excepting seeking to correct the western boundary of the plaintiff's property.

7. Thiru Palaniswami next cited *Jaini Brothers and Company* v. *Shankar Lal*[4], which lays down as to when the High Court can, under section 115, Civil Procedure Code, interfere with an order

1. A.I.R. 1940 Oudh 367.
2. A.I.R. 1935 Patna 463.
3. (1927) 52 M.L.J. 402: 54 I.A. 55: A.I.R. 1927 P.C. 18.
4. A.I.R. 1938 Lah. 270.

passed by the lower Court under Order 6, rule 17, Civil Procedure Code.

8. In *Apurba Krishna* v. *Ram Bahadur*[1], the High Court refused to interfere in revision with regard to the discretion used by the trial Court which refused to amend. the plaint adding interest *pendente lite*. The facts are distinguishable and the decision cannot apply to the present case. Order 6, rule 17, Civil Procedure Code, states: —

> "The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

The Court below has not properly exercised the discretion vested in it by law under Order 6, rule 17, Civil Procedure Code. The basis on which it refused the amendment is that the application for amendment was highly belated and it was likely to cause great prejudice to the defendant in his defence and such an amendment would also complicate the matter, in that, if the amendment were allowed, naturally the rebuttal pleadings pertaining to this aspect of the case would have to be amended and in that case fresh evidence might have to be let in and fresh issues also might crop up for decision. The Court cannot shirk its duties because by amendment the pleadings have to be amended and fresh evidence has to be let in. The predominant interest of the Court should be to render justice and allow amendment for such purposes in order to determine the real question in controversy between the parties. From the facts of the case it is clear that the amendment is necessary in the interests of justice and also to determine the real question in controversy between the parties. There is absolutely no question of a contradictory case being sought to be set up by the plaintiff by way of the amendment, nor has he sought to change the cause of action thereby. Thus it is clear that the Court below has failed to exercise the power vested in it by law under Order 6, rule 17, Civil Procedure Code.

1. A.I.R. 1936 Pat. 191.

9. In these circumstances, the Civil Revision Petition is allowed. No costs.

S.J. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M. M. Ismail, J.*

Rajammal ... *Appellant**

v.

Chinnathal *alias* **Mariyayi** .. *Respondent.*

Evidence Act (I of 1872), section 68—Suit on mortgage—Execution of document denied—No attesting witness examined—Effect.

Once the execution of a document is denied by the alleged executant, the document cannot be admitted in evidence, unless one attesting witness at least has been called for proving the execution of the document, if alive, and subject to process of the Court. [*Para.* 5.]

Cases referred to :—

Venkatasubbiah v. Subbamma and others, (1956) An.W.R. 632; A.I.R. 1956 A. P. 195; *Goudham Rajyalakshmamma* v. *Rayanapati Satyavani*, (1970) 2 An.W.R. 88; *Abdul Jabbar Sahib* v. *Venkata Sastri and Sons*, (1969) 2 M.L.J. (S.C.) 107: (1969) 2 An.W.R. (S.C.) 107: (1969) 2 S.C.J. 784: A.I.R. 1969 S.C. 1147.

Appeal and Memorandum of objections against the decree of the Court of the Subordinate Judge at Pudukkottai in Original Suit No. 29 of 1969.

K. Raman, for Appellant.

R. Rajagopala Ayyar, for Respondent.

The Court delivered the following

JUDGMENT.—The plaintiff in O.S. No. 29 of 1969 on the file of the Court of the

* Appeal No. 681 of 1971 and Memorandum of Objections. 18*th March*, 1975.

Subordinate Judge of Pudukkottai is the appellant herein. She instituted the suit against the respondent on a mortgage Exhibit A-1, dated 16th November, 1964 said to have been executed by the respondent for a sum of Rs. 8,000. The plaint itself stated that the respondent had repaid four sums of Rs. 50 each on 15th April, 1968; 30th April, 1968, 21st June, 1968 and 30th July, 1968 towards interest and the suit was filed for recovery of the balance. One of the several defences that was put forward by the respondent was that she was not aware of the execution and due attestation of the document and that she had not even seen the appellant herein. She also denied the due execution and valid attestation of the mortgage Exhibit A-1. On this question, admittedly no attesting witness was examined as required by section 68 of the Indian Evidence Act, in view of the denial of execution by the respondent. P.W. 2, who is the scribe of the document, was examined. Having regard to this position, the learned trial Judge has stated that the effect of section 68 of the Indian Evidence Act, which requires the examination of at least one attesting witness to a document, which under the law requires to be attested, has been considered in *Venkatasubbiah* v. *Subbamma and others*[1] and that it has been held in that case that " the proof contemplated under section 68 can be furnished by the scribe of the document who could speak to the execution of it and it is not essential that it should be proved only by at least one of the attesting witnesses ". It is on this basis only that the learned trial Judge decreed the suit to the extent of Rs. 5,000 on his finding that the mortgage was supported by consideration only to that extent.

2. The plaintiff has filed the appeal contending that she is entitled to the entire mortgage amount due under the mortgage deed and not merely to the sum of Rs. 5,000 as held by the learned trial Judge, while the defendant has preferred a memorandum of cross-objections contending that even the decree for the sum of Rs. 5,000 ought not to have been granted by the learned Subordinate Judge.

3. I am clearly of the opinion that the conclusion of the learned Subordinate Judge on the admissibility of Exhibit A-1 as a mortgage deed is erroneous. As I have pointed out already, in paragraph 2 of the written statement the respondent categorically denied the due execution and valid attestation of the document. Therefore, section 68 of the Indian Evidence Act is immediately attracted. According to that section, if a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive and subject to the process of the Court and capable of giving evidence. The section contains a proviso that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908, unless its execution by the person by whom it purports to have been executed is specifically denied. In this case, as I have pointed out already, the defendant specifically denied the due execution and attestation of the document and therefore the proviso does not apply and the main part of section 68 alone applies. I am of the opinion that the requirement of that section has not been satisfied in the present case. P.W. 2 is the scribe of Exhibit A-1 and he has given evidence to his having written the document. Nowhere in the course of his evidence he has stated that he was one of the attesting witnesses to the document in question. It has been held by this Court as well as the Supreme Court that an attesting witness must subscribe his signature with the intention that it should be complete attestation of the document and that if the *animo attestandi* is not present, there cannot be a valid attestation. P.W. 2 does not appear to be a witness in Exhibit A-1 and in his evidence also he has not stated that he attested the document with the intention of attesting the same. Under these circumstances, it is clear that the requirement of section 68 of the Indian Evidence Act has not been complied with.

1. (1956) An.W.R. 632 : A.I.R. 1956 A.P. 195.

4. With reference to the decision of the Andhra Pradesh High Court relied on by the learned trial Judge, namely, *Venkatasubbiah* v. *Subbamma and others*[1], the very same High Court in a subsequent decision in *Gaudham Rajyalakshmamma and another* v. *Rayanapati Satyavani*[2] held that the said decision of that High Court was no longer good law after the decision of the Supreme Court in *Abdul Jabbar Sahib* v. *Venkata Sastri and Sons and others*[3], wherein the Supreme Court, as I have already pointed out, took the view that the *animo attestandi* must be present before a person can be said to be an attesting witness.

5. Apart from the above, the language of section 68 is clear and categorical and therefore once the execution of the document is denied by the alleged executant, the document cannot be admitted in evidence, unless one attesting witness at least has been called for proving the execution of the document, if alive, and subject to process of the Court. In this case, there is no evidence to show that the attesting witnesses were not alive and in such circumstances, it is clear that the requirement of section 68 of the Indian Evidence Act has not been complied with and that therefore Exhibit A-1 cannot be used in evidence. The suit being one on the mortgage, Exhibit A-1, and that mortgage document being inadmissible in evidence, it will have to be dismissed.

6. Accordingly the appeal filed by the plaintiff is dismissed and the memorandum of cross-objections filed by the respondent is allowed and the suit will stand dismissed on that ground. There will be no order as to costs both here and in the trial Court.

S.J. ——— *Appeal dismissed. and Memo. of cross objections allowed.*

1. (1956) An.W.R. 632 : A.I.R. 1956 A.P. 195.
2. (1970) 2 An.W.R. 88.
3. (1969) 2 M.L.J. (S.C.) 107 : (1969) 2 An.W.R. (S.C.) 107: (1969) 2 S.C.J. 784: A.I.R. 1969 S.C. 1147.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*V. Ramaswami, J.*

Rasappa Gounder ... *Appellant**

v.

G. N. Ramaswamy ... *Respondent.*

Transfer of Property Act (IV of 1882), section 111 (e)—Joint lessees of land—Surrender of lease by one lessee—Effect—Suit for permanent injunction.

One of the lessees can surrender his interest in the leasehold in favour of the lessor, in which case, the lessor will be entitled to call for partition of that interest alone. [*Para.* 8.]

Cases referred to :—

Venkataswami Reddiar v. *Sundaramoorthy*, (1971) 2 M.L.J. 445 : A.I.R. 1972 Mad. 171 ; *Sudalaimuthu* v. *Palaniyandavan*, (1965) 2 S.C.J. 871 : (1966) 1 M.L.J. (S.C.) 7 : (1966) 1 An.W.R. (S.C.) 7 : (1966) 1 S.C.R. 450 : A.I.R. 1966 S.C. 469 ; *Venkayya* v. *Subba Rao*, (1956) An.W.R. 1093 : A.I.R. 1957 A.P. 619; *Deyu Subhana* v. *Badruddin Hussain*, A.I.R. 1957 Bom. 217 ; *Bindu* v. *Vithoba*, A.I.R. 1931 Nag. 159 ; *Shersingh* v. *Kalusingh*, A.I.R. 1925 Nag. 124 ; *Gopaldas Family Trust Estate* v. *Michaelswami*, (1964) 2 M.L.J. 242 ; *Leek and Moorlands Buildings Society* v. *Clark*, (1952) 2 Q.B. 788 ; *Murugayya Angurar* v. *Nataraja Iyer*, (1969) 1 M.L.J. 503.

Appeal against the decree of the Court of the Principal Subordinate Judge, Erode, in Appeal Suit No. 19 of 1972 preferred against the decree of the Court of the District Munsif of Gobichettipalayam, in Original Suit No. 331 of 1968.

S. Sethuratnam and *A. S. Venkatachalapathy*, for Appellant.

D. Raju and *M. Venkatachalapathy*, for Respondent.

*S.A. No. 2 of 1973. *21st March*, 1975

The Court delivered the following

JUDGMENT.—The plaintiff is the appellant. The suit was filed by him for a permanent injunction restraining the defendant from interfering with his possession on the ground that he is a cultivating tenant in respect of the suit properties entitled to the protection of the Cultivating Tenants Protection Act, hereinafter referred to as the Act. The facts as now found by the Courts below simply stated are as follows :

2. The plaintiff is the second son of one Bagavathi Goundan. The defendant leased the suit properties to the plaintiff and his father sometime in the year 1950. There is no dispute that both these lessees were contributing their physical labour and, therefore, they are cultivating tenants within the meaning of the Act. On 20th May, 1966 the plaintiff's father Bagavathi Gounden died leaving three sons, including the plaintiff, four daughters and his wife as his legal heirs. Sometime after the death of Bagavathi Gounden, except the plaintiff the other two sons, four daughters and wife purported to convey their interest in the tenancy in favour the defendant lessor. When the defendant, on the ground that the interest of some of the lessees had been surrendered to him by the assignment, tried to interfere with the possession of the plaintiff, it resulted in the filing of this suit. A number of points were considered by the Courts below, but none of them survives for consideration in this second appeal except the question of the effect of the surrender by the two sons, four daughters and wife of their interest in the lease-hold property. This question also involves a consideration, as to who are the cultivating tenants, who succeeded the father Bagavathi Gounden and what were their respective interests in the lease-hold property.

3. 'Cultivating tenant' is defined in the Act as including the heirs of a cultivating tenant. In *Venkataswami Reddiar* v. *Sundaramoorthy*[1], a Division Bench of this Court to which I was a party held that in order to get the benefits of the Act the legal representatives also should satisfy the condition of personal cultivation as a required in the definition of cultivating tenant. In the decision in *Sudalaimuthu* v. *Palaniyandavan*[1], the Supreme Court had held that in the case of a joint family, if one of the members of a joint family contributes his labour that would suffice to hold that the family is entitled to the protection under the Act. Therefore, on the death of Bagavathi Gounden his legal representatives were entitled to claim the protection of the Act, if anyone of them satisfied that he had personally contributed his labour in the cultivation of such land. The plaintiff himself as one of the members of the joint family had claimed that he was contributing his labour in the cultivation of the land and that is not disputed. Therefore, the legal representatives of Bagavathi Gounden are also cultivating tenants within the meaning of the Act.

4. The next question for consideration is whether one or more of the tenants could surrender their interest in the lease-hold lands in favour of the lessor. The learned Counsel for the plaintiff-appellant contended that in a case where one of the lessees surrenders his interest to the lessor, the lessees interest is enlarged and the lessor does not derive any interest at all. According to the learned counsel either all the lessees should surrender the right in favour of the lessor or none at all. In other words, as a proposition of law, he submitted that one lessee cannot surrender his interest in the lease-hold when the other lessees do not agree for the same. On the other hand, the learned Counsel for the respondent submitted that there is no prohibition either in the Cultivating Tenants Protection Act or the Transfer of Property Act or any other law prohibiting the surrender of the interest of one of the lessees in favour of the lessor. According to the learned counsel such a surrender is recognised in law in the decided cases. In such a case, it was further contended that the proportionate interest of the lessee is vested in the lessor and the lessor or the remaining lessees would be entitled to claim a partition of their respective rights.

1. (1971) 2 M.L.J. 445 : A.I.R. 1972 Mad. 171.

1. (1965) 2 S.C.J. 871 : (1966) 1 M.L.J. (S.C.) 7 : (1966) 1 An.W.R. (S.C.) 7 : (1966) 1 S.C.R. 450 : A.I.R. 1966 S.C. 469.

The point is very interesting. Though this is not directly decided by any decision, the various aspects decided in each of the cases go to show that the surrender of the interest of one of the lessees is valid and not prohibited by any of the provisions in the Act. There is nothing in the Cultivating Tenants Protection Act itself relating to the surrender of the interest of a cultivating tenant. So far as that is concerned we have to look to only the Transfer of Property Act. Section 111 (*e*) of the Transfer of Property Act provides that a lease of immovable property determines by express surrender, that is to say in case the lessee yields up his interest under the lease to the lessor by mutual agreement between them. So far as the mutual rights of the lessees are concerned, the general law is clearly dealt with in *Venkayya* v. *Subba Rao*[1]: The following passage in the judgment clearly brings out the legal position:

"A lease is not a mere contract but is a transfer of an interest in immovable property, that is to say, of a right to enjoy the property, for a term in consideration of a payment in money or kind by the transferee to the transferor. The lease-hold interest is, like any other interest in immoveable property, capable of being inherited or transferred. Being an estate of inheritance, the interest of the lessee vests on his death, in his heirs executors or legatees. The period of the lease need not be certain or the date of the lease itself. It is enough if it is fixed with reference to a future event which must happen and on the happening of which the lease will stand determined.

5. The period is 'certain' if it can be made certain on a future date, on the principle *id certum est quod certum reddi potest.* A lease for the lifetime of the lessor or lessee or of any other living person will be valid in law.................... ....The fact that one of the lessees pre-deceased the other does not entail a cutting down of the term of the lease and in the absence of a specific provision to that effect in the lease the legal representative of the deceased lessee would be—entitled to the benefit of the lease along with and during the lifetime of the surviving lessee.

6. It is no doubt true that a joint tenancy with a right of survivorship might be created by the use of appropriate words in a grant or a lease, but there is no presumption in its favour.

7. The passage extracted above clearly shows that the interest of the father of the plaintiff Bagavathi Gounden on his death was inherited by his legal representatives and they would be entitled to the benefit of the lease along with the plaintiff.

8. But the next question for consideration is whether the legal representatives or some of them could surrender their interest in favour of the lessor-defendant. In this connection two decisions may be noted. One is the decision in *Deyu Subhana* v. *Badruddin Hussain*[1]. In that case the lease was in favour of three persons. One of them surrendered his interest. The lessor filed an application for delivery of joint possession of the lease-hold property. The application was ordered. However, by consent of parties, the lands were divided into 2/3rds for the lessee and 1/3rd for the lessor for the purpose of cultivation. On an appeal preferred to the High Court, the question for consideration was whether the surrender in favour of the lessor was valid and what was the effect. The learned Judges referred to section 5 (3) (*b*) of the Bombay Tenancy and Agricultural Lands Act, 1948, which provided that a tenant "may terminate the tenancy at any time by surrendering his interest as a tenant in favour of the landlord". The learned Judges considered that the word "interest" denotes that one of the several tenants can also surrender his share. An argument was advanced that under section 111 (*d*) of the Transfer of Property Act, a lease of immovable property is determined in case the interest of the lessee and the lessor in the whole of the property became vested at the same time in one person in the same right and that this showed

1. (1956) An.W.R. 1093 : A.I.R. 1957 A.P. 619.

1. A.I.R. 1957 Bom. 217.

that the Act contemplated surrender of the entire interest in the lease and not surrender of an interest. In other words interest of one of the lessees could not be surrendered. The learned Judges considered this argument and held that though the clause dealt with the surrender of the entire interest of the lessees, there is no prohibition in that clause that one of the tenants or lessees of a joint tenancy cannot surrender his right. With respect to the learned Judges, I am in entire agreement with this reasoning. It is also quite reasonable and just to permit one of the lessees to surrender his own interest because otherwise it will be putting him under an obligation which he does not want to hold. For instance, in a case where the lease is in favour of two persons and one of them does not want to continue the lease further, the other lessee cannot insist on his being a co-lessee with him. The lessor also is not bound to relieve one of the lessees. Therefore, the tenant must be in a position to surrender his interest in favour of the lessor. A similar view was also taken by the Nagpur High Court in *Bindu* v. *Vithoba*[1]. In that case, the lease was in favour of a Hindu joint family and some of the major members of the family executed a deed of surrender of their 2/3rd share. The lessor-plaintiff filed a suit for possession of the holding to the extent of the major sons' share surrendered to him. It was argued that the surrender of unascertained and undefined portion of the holding by some of the tenants is not valid in law. Following the earlier decision in *Shersingh* v. *Kalusingh*[2], the Court held that one of two or more co-tenants is at liberty to transfer to the landlord the rights which he holds in the land against the landlord. Ultimately, the decree for partition as claimed in the suit on the basis of the surrender was granted. The learned Counsel for the appellant relied on a decision of Ramamurti, J. in *Gopaldoss Family Trust Estate* v. *Michaelswami*[3], and contended that one of the lessees cannot surrender his interest in favour of the lessor. It is true in that decision, the learned Judge has held that in case of plurality of lessees, the surrender must be by all the lessees in favour of the lessor. In support of this view, the learned Judge has relied on *Leek and Moorlands Buildings Society* v. *Clark*[1]. In the English case cited, the lease was in favour of the husband by the wife and it was held that one of the joint lessees cannot surrender the rights held jointly before the full period of lease has run out and the lessee who had not joined in the surrender was not estopped from asserting his rights as a joint tenant. It is seen from the facts in the case before Ramamurti, J., that surrender by one of the lessees was of the entire interest and this surrender was relied on to evict the other lessee as well as if one of the lessees can surrender the entire lease. The learned Judge held that one of the lessees cannot surrender the entire right including the others and if there is to be a valid surrender and termination of the entire lease, all the lessees had to join. Apart from this distinction I am also unable to agree that the decision in *Leek and Moorlands Building Society* v. *Clark*[1], could be applied in India. As pointed out by the learned Judges of the Bombay High Court in *Deyu Subhana* v. *Badruddin Hussain*[2], under the English law if one of the joint tenants dies or ceases to exercise his interest, the other joint tenant takes the whole of the interest, by the principle of survivorship. But the law in our country is different. In such a case unless in the grant or lease itself, there are express words to say that the right will go by survivorship as held in *Venkayya* v. *Subba Rao*[3], the right of the deceased would devolve on his legal heirs. The decision in *Leek and Moorlands Building Society* v. *Clark*[1], is, therefore, not applicable. I am also unable to agree with the learned Judge that the decisions in *Deyu Subhana* v. *Badruddin Hussain*[2], and *Bindu* v. *Vithoba*[4], are in any way distinguishable. The decision of Ramamurti, J., was referred to by a Division Bench of this Court in *Murugayya Angurar* v. *Nataraja Iyer*[5]. In that case also the surrender by one of the lessees was put against the other lessee, who did

1. A.I.R. 1931 Nag. 159.
2. A.I.R. 1925 Nag. 124.
3. (1964) 2 M.L.J. 242.

1. (1952) 2 Q.B. 788.
2. A.I.R. 1957 Bom. 217.
3. (1956) An.W.R. 1093 : A.I.R. 1957 A.P. 619.
4. A.I.R. 1931 Nag. 159.
5. (1969) 1 M.L.J. 503.

not surrender, as if one of the lessees could surrender the entire lease-hold right. Relying on the decision of Ramamurti, J. they held that there was no valid termination of the entire tenancy. But there was no occasion for them to consider whether one of the lessees can himself surrender his own interest leaving the interest of the other lessees intact. That was the question for consideration here and for the reasons set out earlier, I am of opinion, that one of the lessees can surrender his interest in the lease-hold in favour of the lessor in which case the lessor will be entitled to call for partition of that interest alone.

9. The next question that arises for consideration is what was the share that was surrendered in favour of the defendant. As already noticed the original lease was in favour of the plaintiff and his father. On the death of the plaintiff's father, only the interest of his father would have devolved on his legal heirs. Since there is no evidence to show that the plaintiff and his father were holding interest in any particular proportion, we have to assume that both were entitled to the interest in equal moieties. Therefore, as a lessee of the original lease the plaintiff would be entitled to a moiety. The plaintiff is also one of the legal heirs of his father and as such legal heir, he will be entitled to 1/8th share in the father's half share. Thus the plaintiff will be entitled in his own right to one half share in the lease-hold and another 1/16th share as the legal representative of his father. Thus, he will be entitled to 9/16th share in the lease-hold property.

10. The suit has been filed for an injunction but the parties agree now that instead of driving them for a suit for partition, this Court may pass a preliminary decree for partition.

11. Accordingly, there will be a preliminary decree declaring the plaintiff's lease-hold right in 9/16th share and for partition of the suit properties into 9/16th share and 7/16th share and allotment of the same to the plaintiff and defendant respectively. The plaintiff will deliver possession of 7/16th share to the defendant. In respect of the 9/16th share retained by the plaintiff, he will be entitled to the rights as a tenant under the Cultivating Tenants Protection Act.

12. It is made clear that till the date of partition and delivery of possession to defendant of the 7/16 share the plaintiff will pay the rent for the 9/16 share and mesne profits for 7/16 share from the date of death of the plaintiff's father. The mesne profits will have to be determined only on the basis of the quantum of rent payable to that portion of the share.

13. There will be no order as to costs.

S.J. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Ramaswami, J.*

Palaniswami .. *Petitioner**

v.

Subbaraya Gounder S/o. Pongia Gounder .. *Respondent.*

Tamil Nadu Court-fees and Suits Valuation Act (XIV of 1955), sections 12, 18—Suit for partition—Creditors of father impleaded—Court-fee payable—Declaration by Court—Subsequent decision of Supreme Court—Application for review—Whether maintainable.

An application for review by a defendant relating to a Court-fee matter is governed by the provisions of section 12 of the Court-fees Act and he could not invoke the provisions of Order 47, rule 1, Civil Procedure Code. [*Para.* 4.]

When a subsequent decision of the Supreme Court was brought to its notice the Court was entitled, though it had no power to review its earlier order, to take up the matter as if it had come to it under section 18 of the Court-fees Act.

[*Para.* 5].

Cases referred to :—

Shamsher Singh v. *Rajinder Prasad,* (1974) 1 S.C.J. 270: A.I.R. 1973 S.C. 2384 : *Janaki Ammal* v. *Rangachari,* (1960) 2 M.L.J. 527; *Ratnavarmaraj* v. *Smt. Vimla,* A.I.R. 1961 S.C. 1299.

*C.R.P. No. 69 of 1974. *15th April,* 1975.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Decree of the Court of the Additional Subordinate Judge, Erode dated 17th December, 1973 and made in I.A. No. 1014 of 1973 in O.S. No. 120 of 1969.

V. Narayanaswami, for Petitioner.

N. Thyagarajan, for the Additional Government Pleader for State.

The Court made the following

ORDER.—This petition is filed by the plaintiff in O.S. No. 120 of 1969, on the file of the Sub-Court, Erode, questioning the order of the Court below directing him to pay additional Court-fee. The petitioner filed the suit for partition and separate possession against his father. He impleaded certain creditors who had obtained money decrees against his father as defendants and prayed for a declaration that the dates are not binding on him. So far as the relief of declaration that the debts are not binding on him is concerned, the petitioner valued the relief under section 25 (*d*) at Rs. 400 and paid Court-fees on that basis. The creditor-defendants objected to the valuation and contended that the relief of declaration should have been valued and Court-fee paid on the amount for which the decree were obtained. After hearing the parties, by an order dated 8th October, 1973 the Court below held that no additional Court-fee need be paid. Subsequently, one of the creditors filed I.A. No. 1014 of 1973 praying for a review of the order dated 8th October, 1973 on the ground that subsequent to the order, in the decision reported in *Shamsher Singh* v. *Rajinder Prasad*[1], the Supreme Court held, in a similar matter, that Court-fee is payable *ad valorem* on the amount for which the decree was obtained, under section 40 of the Court-fees Act. The petitioner had raised before the lower Court the contention that the Court had no jurisdiction to review the order at the instance of a creditor-defendant in view of its earlier order dated 8th October, 1973 which was made after hearing the defendants as well as the plaintiff. The Court below overruled this objection of the plaintiff-petitioner as well.

1. (1974) 1 S.C.J. 270: A.I.R. 1973 S.C. 2384.

2. In this revision petition, the learned counsel for the plaintiff-petitioner contended that the petition for review filed by one of the creditor-defendants was not maintainable and that the order passed on it by the Court below was one without jurisdiction.

3. The provisions contained in section 12 of the Court-fees Act, which deals with the decision as to proper Court-fee, may be summarised as follows: In the first instance, the Court in which the suit is instituted has to decide the proper Court-fee payable on the plaint on the materials and allegations contained in the plaint and on the materials contained in the statement, if any, filed under section 10 of the Act, before ordering the plaint to be registered. But, this decision is subject to review, further review and correction in the manner specified in sub-sections (2), (3), (4) and (5) of that section. The order could be reviewed at the instance of a defendant or at the instance of a defendant who is added later on, at any time after the written statement is filed, or before evidence is recorded on the merits of the claim. The order could be further reviewed under section 18, at the instance of the Court-fee Examiner. The order of the Court could be corrected by a Court of appeal or a revisional Court when the matter comes up before the Court in appeal or in revision. It would thus be seen that once a defendant has raised an objection as to the valuation of the suit or the proper Court-fee payable, and a decision has been given after such enquiry, as the Court deemed fit, thereafter there was no power for the Court to go into the question of valuation of the suit or payment of proper Court-fee thereon at the instance of a defendant. The Court could have dealt with the matter only on a point raised by the Court-fee Examiner under section 18. Even, here, once the Court-fee Examiner had raised a point and that was considered and decided by the Court, the order thereafter made under section 18 (2) becomes final so far as the trial Court is concerned and the trial Court could not review the order. The only remedy thereafter is for the appellate Court or the revisional Court to correct the error under section 12 (4).

This was also the view expressed by this Court in *Janaki Ammal* v. *Rangachari*[1]. The head-note in that decision which brings out the ratio correctly may be usefully quoted here:

> "Ordinarily there are three stages at which a Court can enquire into the question whether a plaint or appeal has been properly valued. They are (*a*) Before the registration of the plaint or appeal. In such cases it will be open to the Court to review, correct and further review its decision in the manner specified in section 12 (1) of the Madras Court-fees Act; (*b*) After the suit or appeal has been registered an issue on the question of Court-fee can be raised by the defendant or respondent and the Court should decide the matter. In such cases the decision will be binding on the Court that rendered it unless a fresh decision is asked for by the Court-fee Examiner; (*c*) on the objection of Court-fee Examiner under section 18 of the Act, when a decision has been given on the report of the Court-fee Examiner no further review or reconsideration is possible except by an appellate Court under section 12 (4) of the Act. A decision given under section 18 (2) of the Madras Court-fees and Suits Valuation Act, 1955, will be final so far as that Court is concerned. In the absence of a statutory provision expressly enabling the Court to review its decision, a decision on the question of Court-fee once given will be binding on the Court which gave the decision at all subsequent stages".

Thus, the defendant had no right to file a review petition before the Court below.

4. The review petition was purported to have been filed under Order 47, rule 1, Civil Procedure Code. It is true that an order made on a question of Court-fee shall be deemed to form part of the decree or final order which the Court may ultimately pass on the merits in the suit itself as provided under section 20 of the Court-fees Act. Therefore, it may be considered to be a decree or order from which no appeal is allowed within the meaning of Order 47, rule 1, Civil Procedure Code. But, the question is whether though the order relating to the Court-fee payable may be said to be final, from which no appeal is allowed, a review could be filed under Order 48, rule 1, Civil Procedure Code. I am of the view that so far as the application for review by a defendant relating to a Court-fee matter is concerned, it is governed by the provisions of section 12 of the Court-fees Act and he could not invoke the provisions of Order 47, rule 1, Civil Procedure Code. In fact, on the question of maintainability of a revision by a defendant against an order in relation to Court-fee, the Supreme Court, in *Ratnavarmaraj* v. *Smt. Vimla*[1] has held that unless the question affects the jurisdiction of the Court, on a mere question of Court-fee no revision could be filed at the instance of a defendant, as section 12 of the Court-fees Act does not enable him to file any such petition. The ratio in *Janaki Ammal* v. *Rangachari*[2], is also to the effect that the decision is final so far as the trial Court is concerned and not liable to be reviewed at the instance of a defendant. Therefore, the learned counsel for the petitioner is well-founded in his contention that the petition for review at the instance of the defendant, after the Court-fee question had been decided on his objection under section 12 (2) of the Court-fees Act, was not maintainable.

5. But that does not dispose of the question altogether. The petition for review could be treated as an intimation to the Court that its earlier order is not correct in law and requires to be reconsidered, and, if the Court considers that a reconsideration is called for, it can act *suo motu* as in the case of a question raised by the Court-fee Examiner under section 18 of the Court-fees Act. In this case, the Court had held originally, without noticing the decision of the Supreme Court, that the plaintiff need not pay Court-fee on the amount for which the decrees had been obtained.

1. (1960) 2 M.L.J. 527.

1. A.I.R. 1961 S.C. 1299.
2. (1960) 2 M.L.J. 527.

by the creditors against his father. The Supreme Court, in *Shamsher Singh* v. *Rajinder Prasad*[1], has held that in such a case Court-fee is payable *ad valorem* When this was pointed out, in my opinion, the Court was entitled, though it had no power to review its earlier order, to take up the matter as if it had come to it under section 18 of the Court-fees Act. In fact, the learned counsel for the petitioner could not dispute that even now if a note comes from the Court-fee Examiner that the earlier decision requires re-consideration, the Court is bound to reconsider it under section 18. Though the learned counsel for the petitioner contended that section 18 could be invoked on a specific note by the Court-fee Examiner I do not think it is necessary to restrict the scope of section 18 to the Court getting knowledge of the incorrectness of its order from the source of the Court-fee Examiner's report. In such circumstances, it is not necessary, in my opinion, for the Court to call for a report from the Court-fee Examiner and then decide the issue. In view of the decision of the Supreme Court, the error in the earlier order became manifest and apparent. The Court shall have power to correct such a mistake committed on the earlier occasion. There is no need for hyper-technicalities to be raised in this matter, of asking for a report from the Court-fee Examiner in such circumstances. But in such a case the order shall be deemed to be one made only under section 18 (2) as there is no other power for the Court to review and it would be final so far as the trial Court is concerned and it would not be liable for further review.

6. Before parting with this case, it should also be noted that the learned counsel for the petitioner tried to distinguish the decision of the Supreme Court on the ground that the decrees obtained by the creditors were against the father alone and that the son-petitioner was not a party to them. But, as pointed out by the Supreme Court itself in that judgment, that fact is irrelevant, and even in such cases, the decrees have to be set aside, the Court-fee is to be paid *ad valorem* on the amounts for which the decrees had been obtained by the creditors.

7. In the result, the civil revision petition is dismissed. The plaintiff-petitioner is given three months' time to pay the deficit Court-fee if he has not already paid it. No costs.

S.J. ——— *Petition dismissed.*

1. (1974) 1 S.C.J. 270 : A.I.R. 1973 S.C. 2384.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*G. Ramanujam and V. Ramaswami, JJ.*

Soundararaja Peter and others .. *Petitioners**

v.

Florence Chelliah and others .. *Respondents.*

(*A*) *Succession Act* (*XXXIX of* 1925), *sections* 217, 222, 232 *to* 235—*Will*—*No executor appointed*—*Application by a beneficiary for grant of probate*—*Whether maintainable*—*Letters of Administration*—*All legatees before the Court*—*Duty of Court.*

(*B*) *Probate Duty*—*Payable by whom.*

Probate cannot be issued under section 232 of the Indian Succession Act, if no Executor had been appointed either expressly or by necessary implication [*Para.* 5.]

Section 232 of the Indian Succession Act cannot be understood as enabling only a residuary or universal legatee to prove the will and claim letters of administration. Section 234 specifically provides that any legatee having a beneficial interest may also prove the will and seek Letters of Administration. Section 235 specifically refers to the case of an universal or residuary legatee applying for Letters of Administration and prohibit the grant of Letters of Administration unless citation has been issued and published in the manner prescribed.

*A.No. 288 of 1970. *15th July*, 1974.

On the face of it section 235 does not apply to a case where a legatee applies for Letters of Administration. Apart from this, when all the legatees are before the Court and there being no other person having beneficial interest under the will no citation or publication appears to be necessary having regard to such a citation and publication. [*Paras.* 6, 7.]

Appeal against the decree of the District Court, Madurai dated 17th September, 1969 in Original Suit No. 2 of 1967.

K. Parasaran, for *R. Srinivasan* and *P. S. Nagaswamy Iyer,* for Petitioners.

V. P. Raman for *N. Srivatsamani,* for Respondents.

The Judgment of the Court was delivered by

Ramanujam, J.—Defendants 2 and 3 in O.S. No. 2 of 1967 on the file of the Court of the District Judge, Madurai, are the appellants in this appeal arising out of a suit filed under section 217 read with section 222 of the Indian Succession Act, by one of the daughters of one Mrs. Natchatram Peter Issac for grant of a probate of the last Will and testament of the said Mrs. Natchatram Peter Issac. The plaintiff and defendants 4 to 6 are the daughters and defendants 1 to 3 are the sons of the said Mrs. Natchatram Peter Issac. The father Mr. Peter Issac, died in 1941 and the mother died on 20th August, 1960. The father had earlier left a Will bequeathing one third of his properties to his wife Mrs. Natchatram Peter Issac. According to the plaintiff, her mother left a Will dated 26th August, 1958 whereunder all the properties which belonged to her have been bequeathed to all her daughters, the plaintiff and defendants 4 to 6. The grant of either probate or Letters of Administration with the Will annexed is sought for in the suit in relation to the said Will.

2. The suit has been resisted by defendants 1 to 3. They denied the genuineness of the Will. According to them, their mother was 80 years old and for a few years prior to her death on 20th August, 1960, she had paralytic stroke and was completely bed—ridden and she was not in a sound and disposing state of mind. It is their case that taking advantage of the helpless position of their mother, the plaintiff with the connivance of the 5th defendant with whom the mother was living, had brought about the said Will fraudulently. Defendants 4 to 6 remained *ex parte*.

3. On the defence raised by defendants 1 to 3, the main question that came up for consideration before the Court below was whether the testatrix executed the Will when she was in a sound and disposing state of mind and whether the Will is true and genuine.

4. The plaintiff has examined P.W. 2, the scribe and P.W. 4, an attestor; to prove that the Will was duly executed by the testatrix. She also examined, P.W. 3, an Advocate of the Madurai Bar who prepared the draft for the Will, Exhibit A-2 in the case. The trial Court, mainly on the basis of the evidence of these three witnesses, held that the Will had been duly executed by the mother of the plaintiff. As regards the question as to whether she was of sound and disposing state of mind at the time of the execution of the Will, the Court below found that she had been attending to certain proceedings and also was operating bank accounts. It also relied on other evidence in the case indicating that the mother of the plaintiff was in a position to attend to her own affairs and that she could not have been bed-ridden at or about the time of the execution of the Will, Exhibit A-1, dated 26th August, 1958 as alleged by the contesting defendants. It specifically considered the defence case that the testatrix suffered a paralytic stroke two years before her death and ever since then she has been confined to bed and that her physical and mental condition was so weak that she cannot attend to her own affairs in the light of the evidence adduced by them. The evidence in this regard adduced by the contesting defendants consists of the evidence of D.Ws. 1 to 3. D.W. 1 is 1st defendant and is the the eldest son. He deposed that his mother had a paralytic attack two years ago and from then onwards she was bed-ridden. He admitted that she was being attended by one Dr. Manikava-

sagam. But the said doctor has not been examined to speak to the truth and the nature of the paralytic attack and about the physical condition of the lady after the alleged attack. D.Ws. 2 and 3 are strangers who have spoken to the fact that the lady was suffering from paralysis and was not moving about. But, in the absence of direct evidence from the doctor as to the nature of the disease, the lower Court was not inclined to accept the evidence of these witnesses when they said that the lady was not in a position to move about and was not in such a mental state as to execute the Will in question. If therefore, proceeded to hold that the Will was true and genuine and that the testatrix was of sound and disposing state of mind at the time of the execution of the Will. In that view, it decreed the suit granting probate in favour of the plaintiff on her satisfying certain formalities.

5. In this appeal, the appellants not only challenge the decision of the Court below on merits, but also challenge the grant of probate on legal grounds. It is the contention of Mr. Parasaran, learned counsel for the appellants, that the grant of probate in this case is not legal and that probate can be granted only in favour of an Executor when one is appointed by the will. It is pointed out by the learned counsel that in the will no Executor has been appointed either expressly or by necessary implication and therefore the issue of probate in respect of it is will.is out of question. We are inclined to agree with the learned counsel on this part of the case. It is not in dispute that in the will no Executor has been appointed either expressly or by necessary implication. Therefore, a probate cannot be issued under section 232 of the Indian Succession Act, as has been done in this case. But, as already pointed out, the plaintiff has asked for an alternative relief of Letters of Administration with the Will annexed. The question is whether the plaintiff will be entitled to the Letters of Administration, if on merits, the will is held to be true and genuine and the testatrix is found to be of sound and disposing state of mind at the time of the execution of the will. According to the learned counsel for the appellants, even Letters of Administration cannot be granted in respect of the will in question. Reference was made to sections 232 and 235.

6. Section 232 applies to a case where the testator has not appointed an executor. The section states that where an executor has not been appointed under a will or the executor appointed is incapable of or has refused to act or has died before the testator or before proving the will, an universal or residuary lagatee may be admitted to prove the will, and Letters of Administration with the will annexed may be granted to him of the estate. Section 235 provides that Letters of Administration with the will annexed shall not be granted to any legatee other than an universal or a residuary legatee, until a citation has been issued and published in the manner prescribed by the provisions of that Act. Mr. Parasaran contends that though Letters of Administration could be granted under section 232 to an universal or a residuary legatee, the plaintiff not being an universal or a residuary legatee, is not entitled to the Letters of Administration under the said provision. It is also further pointed out that no citation having been issued or published in the manner prescribed by the Indian Succession Act, no Letters of Administration could be issued to the plaintiff even if she is treated as an universal or a residuary legatee in view of the prohibition contained in section 235. It is true that the plaintiff is not an universal or a residuary legatee under the terms of the will Exhibit A-1. She is one of the four legatees under the terms of the will Exhibit A-1, and all the properties covered by the will have been bequeathed to them and there is no residue to be administered. We do not understand the provisions in section 232 as enabling only a residuary or an universal legatee to prove the will and claim Letters of Administration. Section 234 specifically provides that any legatee having a beneficial interest may also prove the will and seek Letters of Administration. The plaintiff being a legatee under the will, and there being no universal or residuary legatee, the provisions of section 234 will come into play. The plaintiff is therefore,

entitled to prove the will and get Letters of Administration in relation to that will.

7. The only further question is whether she can get Letters of Administration without the citation and the publication in the manner contemplated by section 235. Section 235 specifically refers to the case of an universal or a residuary legatee applying for Letters of Administration and prohibit the grant of Letters of Administration unless citation has been issued and published in the manner prescribed. On the face of it section 235 does not apply to a case where a legatee applies for Letters of Administration. Apart from this, when all the legatees are before the Court and there being no other person having beneficial interest under the will, no citation or publication appears to be necessary having regard to the object of such a citation and publication. Admittedly, in this case all the legatees mentioned in the will in question are before the Court and they are the plaintiff and defendants 4 to 6. Defendants 4 to 6 have not raised any objection for the grant of either Probate for Letters of Administration to the plaintiff and they in fact sail together. It is only defendants 1 to 3 who get no beneficial interest under the will are questioning the grant of Probate or Letters of Administration. Therefore section 235 does not stand in the way of the grant of Letters of Administration in favour of the plaintiff in the circumstances of this case.

8. The Court below decreed the suit granting probate in favour of the plaintiff on her satisfying the required formalities. As already stated the grant of probate in this case cannot be legally sustained and the plaintiff can only be granted Letters of Administration with the will annexed. Presumably this legal point was not addressed before the Court below and no one appears to have questioned the propriety of the Court below granting the probate. We have to therefore, hold that if the plaintiff established the truth and genuinesss of the will and the testamentary capacity of the testatrix then the plaintiff will be entitled to Letters of Administration with the will annexed and not to a probate as held by the Court below.

* * *

Here we agree with the Court below that this will is true and genuine and that it was executed by the testatrix while she was in a sound and dispoing state of mind.

* * *

9. The learned counsel for the appellants lastly points out a mistake that has crept in the drafting of the decree. The suit has been decreed with costs of the plaintiff. That means the plaintiff will be entitled to her costs in the suit. But the decree in the suit has been drafted in such a way that a liability has been cast on defendants 1 to 3 as regards the probate duty payable by the plaintiff in respect of the will in question. This is entirely wrong. Defendants 1 to 3 can in no event be liable for the probate duty, which the plaintiff is liable to pay. We therefore, direct the deletion of that portion of the decree which makes the defendants 1 to 3 liable for the probate duty. The appeal is dismissed except for the above modification in the decree. There will be no order as to costs.

R.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*M. M. Ismail, J.*

Jayarama Chandra Iyer .. *Appellant**

v.

Thulasi Ammal and others ... *Respondents.*

Deed—Attestation—Binding nature of—'J' and 'D' brothers—Sale deed in the name of 'D' alone—Attestation by 'J'—Claim by 'J' as joint family property—Burden of proof.

In the case of a sale deed standing in the name of one of two brothers the burden lies on the other brother claiming it to be joint family property to prove that, notwithstanding the sale deed standing in the name of one of them the property was purchased for the benefit of both the brothers. [*Para.* 2.]

*A. No. 103 of 1971. 11*th February*, 1975

If the attestor of a document has an existing interest in the property dealt with in the document it has been always the case that this "attestation" has been taken in order to bind him as to the correctness of the recitals therein.

[*Para.* 5.]

Cases referred to :—

Ramaswamy Gounder v. *Ananthapadmanabha Iyer*, (1971) 1 M.L.J. 392 ; *Narayana* v. *Rama*, (1915) I.L.R. 38 Mad. 396 : 25 M.L.J. 219; *Kantiasami* v. *Nagalinga*, (1913) I.L.R. 36 Mad. 564 : 23 M.L.J. 301.

Appeal against the decree of the Court of the Subordinate Judge, Chidambaram in Original Suit No. 36 of 1968.

P. S. Ramachandran, for Appellant.

K. Gopalachari, *G. Krishnan* and *S. Venkatachari*, for Respondents 1 to 6.

V. Ratnam, for 10th Respondent.

The Court delivered the following

JUDGMENT.—The plaintiff in O.S.No.36 of 1968 in the file of the Court of the Subordinate Judge of Chidambaram, is the appellant herein. The suit was instituted by him for partition and separate possession of his half share in the suit properties which consist of five items and for recovery of his share of income from items 4 and 5 of the plaint A schedule properties. Since the plaintiff has been granted a decree in respect of items 2 to 5, the appeal is confined only to item 1, a residentital house in Vridachalam. There were two brothers, Krishnaswami Iyer and Kuppuswami Iyer. Krishnaswami Iyer, in his turn, had two sons, the appellant herein and one Dandapani Iyer, who died on 18th October, 1963 whose widow is the first respondent, whose sons are respondents 3 and 6, whose daughters are respondents, 3, 4, 5 and 7 and whose grandson through a predeceased daugher is the eighth respondent. Respondents 9 and 10 are strangers claiming some interest in the property. As far as item 1 of the A schedule property is concerned, the case of the plaintiff was that Dandapani Iyer and Krishnaswami Iyer constituted a joint family, that under the original of Exhibit A-4, dated 15th May, 1963 certain lands belonging to the joint family were sold for Rs. 3,000 and out of the sale proceeds a house was purchased under Exhibit B-1, dated 20th June, 1963 for a consideration of Rs. 1,600 and that consequently the plaintiff (appellant) representing Krishnaswami Iyer's branch was entitled to a half share in the property. Certain other facts have to be set out with reference to this claim of the appellant. The original of Exhibit A-4, dated 15th May, 1963 was executed by Dandapani Iyer himself and his two sons, Ganesan and Krishnamurthi as well as by the appellant in favour of one Pachamuthu Odayar. On the date of the document Dandapani Iyer received Rs. 200 by way of advance. The document itself was registered only on 17th June, 1963. The case of the appellant was that the balance of the consideration for the sale deed under Exhibit A-4, *viz.*, Rs. 2,800 was received only on 19th June, 1963, *i.e.* even after the registration of Exhibit A-4 itself. The next day the suit item was purchased under Exhibit B-1, dated 20th June, 1963 after paying Rs. 1,600 to Rathnasabapathi Pillai, the vendor. Rathnasabapathi Pillai is no other than the son of one Rangasami Pillai, an Advocate under whom Dandapani Iyer was working as a clerk. It is on the basis that the sale proceeds under Exhibit A-4 were utilised for the purchase of the property under Exhibit B-1, that the appellant claimed a half share in the suit property.

2. This claim was resisted by defendants 1 to 8 putting forward the contention that the property under Exhibit B-1 was not purchased out of the sale proceeds under Exhibit A-4 but from separate moneys belonging to Dandapani Iyer and his wife as well as Dandapani Iyer's son, who was working. It must be pointed out that the sale deed, Exhibit B-1, itself stands only in the name of Dandapani Iyer, and the sale deed has been attested by the appellant himself. Having regard to the fact that the sale deed stands in the name of Dandapani Iyer, the burden was on the appellant to prove that, notwithstanding the sale deed standing in the name of Dandapani Iyer, the property was purchased for the benefit of both the brothers, *viz.*, Dandapani Iyer and the appellant herein. In support of this

case, the only witness who has given evidence is the appellant himself, as P.W. 1. Having gone through the entire evidence of the appellant, I am clearly of the opinion that the appellant has not discharged the burden of proving that the property purchased under Exhibit B-1 was for the benefit of both Dandapani Iyer and the appellant, and not for the exclusive benefit of Dandapani Iyer. There are certain circumstances which are clinching in this behalf. The first is that the appellant has stated in his evidence that the balance of consideration for the sale of the property under Exhibit A-4 was received only on 19th June, 1963 even though the document itself was registered on 17th June, 1963. It must be pointed out that the vendee under Exhibit A-4 is not any person who was closely connected with the vendor, but a stranger, and how the money was received after the registration of the sale deed passes one's comprehension. It is therefore clear that the appellant has put forward the case that the balance of consideration under Exhibit A-4 was received only on 19th June, 1963 for the purpose of connecting the same with the purchase of the suit house under Exhibit B-1. Apart from the *ipse dixit* of the appellant, there is no independent evidence also in this case. Neither the vendee under Exhibit A-4 nor the vendor under Exhibit B-1 has been examined to show that the balance of consideration under Exhibit A-4 was received only on 19th June, 1963 and that the consideration for the purchase of the property under Exhibit B-1 was paid to the vendor under Exhibit B-1 under the circumstances stated by the appellant herein.

3. The second circumstance is that the property has been purchased in the name of Dandapani Iyer alone. Even the appellant as P.W. 1 had admitted that at the time when the property was purchased Dandapani Iyer was suffering from giddiness and oedema of legs and was not able to attend to his work, and, as a matter of fact, he was even confined to bed. If so, having regard to the fact that Dandapani Iyer was seriously ill and he had his own children, it is not probable at all that the appellant would have allowed Dandapani Iyer to purchase the property in his name, when according to the appellant, the consideration belonged to both himself and Dandapani Iyer. The only explanation which he offered was that he had such a great trust in his brother, that he did not expect his brother to deceive him or dupe him and that therefore he allowed the property to be purchased in the name of Dandapani Iyer. Having regard to the admitted fact that Dandapani Iyer was very ill at the relevant time and admittedly died about a few months thereafter, the appellant, who himself was a clerk in a co-operative bank, would not have allowed the property to be purchased into the name of Dandapani Iyer alone, having regard to the state of his health and the fact that he had a large number of children.

4. The third circumstance is that the appellant has admittedly attested Exhibit B-1. It is again admitted by P.W. 1 that Dandapani Iyer asked him to attest the document and that therefore he attested it. Here again, the only explanation offered by the appellant is that his brother asked him to attest the document and that therefore he simply attested it. It is not possible to accept this explanation at all. Dandapani Iyer would not have asked the appellant to attest the document without a purpose for the same. It is not as if there was nobody else available to attest the document, the only person available was the appellant himself and therefore Dandapani Iyer asked the appellant to attest the document. It is clear that Dandapani Iyer asked the appellant to attest the document only with a view to bind him with regard to the purchase of the property in his name.

5. With regard to such an attestation, it has been held by this Court in *Ramaswamy Goundar* v. *Anantapadmanabha Iyer*[1], that such an attestation was purposely taken in order to bind the person so attesting. As a matter of fact, in that judgment, the observations of Sadasiva Ayyar, J. in *Narayana* v. *Rama*[2], to the following effect were quoted :

1. (1971) 1 M.L.J. 392.
2. (1915) I.L.R. 38 Mad. 396 : 25 M.L.J. 219.

"I may respectfully add that, in my pretty long experience as a Judicial Officer, if the attestor of the document has an existing interest in the property dealt with in the document, it has been always the case that this 'attestation' has been taken in order to bind him as to the correctness of the recitals therein."

That was also the view of the learned Judge in an earlier judgment, namely, *Kaniasami* v. *Nagalinga*[1]. Having regard to this legal position, the attestation of the appellant in Exhibit B-1, at the instance of the vendee therein, *viz.*, Dandapani Iyer, could only be for the purpose of making the appellant bound by the purchase of the property in the name of Dandapani Iyer.

6. The fourth circumstance to which reference may be made is that, if the purchase of the property under Exhibit B-1 was made out of the sale proceeds under Exhibit A-4, the question would naturally arise as to what happened to the balance of the sale proceeds. The appellant has not offered any explanation whatever with regard to this. If he had claimed a half share in the concerned item on the ground that it was purchased out of the sale proceeds of Exhibit A-4, naturally he would have put forward the same claim with regard to the balance of the sale proceeds also, but there is absolutely no evidence to show that he put forward any such claim and there is no explanation as to what happened to that money also.

7. Having regard to these factors, which are relevant and also significant, I am clearly of the opinion that the appellant has not made out his case that the property purchased under Exhibit B-1 in the name of Dandapani Iyer was really meant for the benefit of Dandapani Iyer and the appellant herein.

8. Mr. P. S. Ramachandran, learned counsel for the appellant, took me through the evidence of D.Ws. 1 and 2, D.W. 1 being the first defendant in the suit, and D.W. 2 being the father of the eighth defendant, *viz.*, son-in-law of the deceased Dandapani Iyer. The said son-in-law himself was a vakil's clerk. On the basis of this evidence the learned counsel contended that they put forward the case of a different source of consideration for the purchase of the property under Exhibit B-1 and that even that source of consideration had not been established. I am of the opinion that this argument is really of no assistance to the appellant herein. Practically D.W. 1 has stated, "I do not know" to many questions put to her. Dandapani Iyer having died, and the defendants being only his legal representatives it is not unlikely that they had no personal knowledge of the transactions and the final affairs of Dandapani Iyer and that consequently D.W. 1 stated, "I do not know" to many questions put to her, though she put forward the contention that the consideration for the purchase of the property under Exhibit B-1 was made up of Dandapani Iyer's earnings and the second defendant's earnings as well as the money which D.W. 1 herself provided by the sale of her jewellery. This may or may not be true. Still, as I pointed out already, the burden was on the appellant, who came to Court with the specific case that the property purchased under Exhibit B-1 was purchased with the sale proceeds under Exhibit A-4 and therefore belonged to both Dandapani Iyer and the appellant. As I pointed out already, Dandapani Iyer himself was a vakil's clerk and it is the admitted case of the appellant himself that he was also a job typist. If so, it is not impossible that Dandapani Iyer was able to find the sum of Rs. 1,600 for the purchase of the property under Exhibit B-1.

9. Mr. P. S. Ramachandran contended that Dandapani Iyer himself was in debts and that therefore he could not have found the money for the purchase of the property under Exhibit B-1. Here again, having regard to the fact that the burden lay on the appellant himself, I am unable to draw any inference in favour of the appellant, even if it is established that Dandapani Iyer was in debts.

10. Under these circumstances, I am of the opinion that the conclusion of the learned Subordinate Judge, that the appel-

1. (1913) I.L.R. 36 Mad. 564 : 23 M.L.J. 301.

lant has not established his case that the property purchased under Exhibit B-1 in the name of Dandapani Iyer was for the benefit of both Dandapani Iyer and the appellant, is correct and does not call for interference. Hence the appeal fails and is dismissed. Having regard to the relationship between the parties, I make no order as to costs.

R.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—*P. R. Gokulakrishnan, J.*

S. Ganapathy .. *Petitioner**

v

N. Kumaraswami .. *Respondent.*

Limitation Act (XXXVI of 1963), section 5—Landlord and tenant—Petition for eviction—Eviction ordered—Appeal—Delay in filing—Application to condone delay—Appellate Authority under Rent Control Act—Whether can condone delay.

As far as the Rent Controller and the Appellate Authority created under the Tamil Nadu Buildings (Lease and Rent Control) Act, are concerned, it is clear that such authorities are *persona designata* and the Limitation Act provisions applicable to ' Court ' cannot be invoked in proceedings before such *persona designata* [*Para.* 16.]

Cases referred to:—

J. Fernandez v. *A.K. Umma*, A.I.R. 1974 Ker. 162 (F.B.) ; *Abdul Wahid* v. *Abdul Khader*, I.L.R. (1948) Mad. 43: (1947) 1 M.L.J. 207 : A.I.R. 1947 Mad. 400 . *Chinniah Thevar* v. *F. M. Badsha*, (1948) 1 M.L.J. 314 : A.I.R. 1948 Mad. 439 ; *J.Easwaran* v. *Palaniammal*, (1974)T.L.N.J. 380 ; *Rajan Ayyar* v. *Pavanambal*, A.I.R. 1929 Mad. 287 ; *M. Joshi* v. *Life Insurance Corporation of India*, (1969) 2 S.C.J. 749 : (1970) 1 S.C.R. 396 : A.I.R. 1970 S.C. 209; *Athani Municipality* v. *Labour Court Hubli*, (1970) 1 S.C.J. 1 : (1970) 1 S.C.R. 51 ; *Sankar* v. *Buvanambal Ammal*, (1971) 84 L.W. 134 : (1971) 1 M.L.J. 230 : A.I.R. 1971 Mad. 368 ; *Venugopal* v. *Third Judge, Sm.C.C. Madras*, (1949) 1 M.L.J. 471: I.L.R. 1950 Mad. 28: A.I.R. 1949 Mad. 776; *A. Pafeeq Ahmed Sahib* v. *Istiaq Ahmed*, (1975) 88 L.W. 135 ; *G.D.M. Rao* v. *Ranga Pansiah and Bros.*, A.I.R. 1975 A. P. 13; *Central Talkies Ltd.* v. *Dwarka Prasad*, (1962) 2 S.C.J. 41 : (1961) 3 S.C.R. 495: A.I.R. 1961 S.C. 606; *Imperial Bucket Company* v. *S. M. Bhagwati Basik*, A.I.R. 1954 Cal. 520 ; *Vasanji V. Chela and Company* v. *State of Maharashtra*, (1968) 22 S.T.C. 104.

Petition under section 115 of Act V of 1908 and section 25 (1) of Act XVIII of 1960 as amended by Act XXIII of 1973 praying the High Court to revise the order of the Court of the Principal Subordinate Juge, Madurai, dated 31st August, 1974 and made in I.A. No. 353 of 1973, in unfiled Civil Miscellaneous Appeal No. 1974 A. No. 11373, against the order of the First Additional District Munsif, Madurai, dated 13th March, 1975 in R.C.O. P. No. 559 of 1971.

K. J. Chandran, for Petitioner.

K. Govindarajan, for *M. K. Venkataswami* and *A. Sivaji*, for Respondent.

The Court made the following

ORDER.—The tenant is the petitioner herein. The respondent filed R.C.O. P. No. 559 of 1971 on the file of the First Additional District Munsif (Rent Controller) Madurai, for eviction of the petitioner herein on the ground of wilful default in the payment of rent. The Rent Controller found that the petitioner herein has committed wilful default in the payment of rent and on that ground, ordered eviction, giving the petitioner herein three months' time for vacating the premises. Aggrieved by the decision of the Rent Controller, the petitioner herein presented a civil miscellaneous appeal before the Subordinate Judge of Madurai. Since there was a delay of sixteen days in preferring the said appeal against the order of eviction, the petitioner herein filed I.A. No. 353 of 1973 along with the said appeal, under section 5 of the Limitation Act, to condone the delay in filing

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*C.R.P. No. 3148 of 1974. *2nd May*, 1975.

the appeal. Following the principles laid down by this Court in the decision reported in *J. Easwaran* v. *Palaniammal*[1], to the effect that section 5 of the Limitation Act cannot be invoked by the Rent Controller and the Appellate Authority under Act XVIII of 1960, since they are not Courts, but only *persona designata*, the Subordinate Judge dismissed the application. Aggrieved by the said decision of the Subordinate Judge, the tenant has preferred this revision petition.

2. The only question that has to be decided in this civil revision petition is whether section 5 of the Limitation Act is applicable for condoning the delay in preferring an appeal against the order of the Rent Controller.

3. Thiru K. J. Chandran, the learned counsel appearing for the petitioner herein, submitted that the Rent Controller, or, in any event, the Appellate Authority is not a *persona designata*, but is a Court. The learned counsel further contended that section 5 of the Limitation Act read with section 29 (2) of the said Act clearly gives the power to the Appellate Authority to condone the delay in preferring the appeal. On the other hand, the learned counsel appearing for the respondent submitted that neither the Rent Controller nor the Appellate Authority can be construed as a Court but they are only *persona designata* and as such neither section 5 nor section 29 (2) of the Limitation Act will apply for condonation of the delay. Both the counsel cited a number of decisions in support of their respective contentions which I will deal with presently.

4. Sub-section (3) of section 2 of the Tamil Nadu Buildings (Lease and Rent Control) Act XVIII of 1960, as amended by Act XXIII of 1973, defines ' Controller ' as meaning:

> " any person appointed by the Government, by notification, to exercise the powers of a Controller under this Act for such area as may be specified in the notification."

Section 23 (1) (*a*) of the Act states:

> " The Government may, by general or special order notified in the Tamil Nadu Government Gazette, confer power on such officers and authorities for the purpose of this Act, in such areas and in such classes of cases as may be specified in the order ".

Section 23 (1) (*b*) states:

> " Any person aggrieved by an order passed by the Controller may, within fifteen days from the date of such order prefer an appeal in writing to the appellate authority having jurisdiction. In computing the fifteen days aforesaid the time taken to obtain a certified copy of the order appealed against shall be excluded."

Dealing with more or less identifical provisions in the Kerala Buildings (Lease and Rent Control) Act (II of 1965), a Full Bench of the Kerala High Court opined in *J. Fernandez* v. *A. K. Umma*[1], that the Appellate Authority is a *persona designata* and as such neither section 5 nor section 5 read with section 29 (2) of the Limitation Act will apply for condoning delay in filing appeals. The Full Bench observed:

> " Even if the power under section 5 were to be read into special local law by reason of the provisions of section 29 of the Limitation Act, that power is exercisable only by Courts and not by Tribunals or other authorities such as the appellate authority in this case."

In further dealing with section 18 (1) (*b*) of Kerala Act II of 1965, which is akin to section 23 of the Tamil Nadu Act, the Full Bench observed:—

> " The provisions of section 18 (1) (*b*) therefore show that the Kerala Buildings (Lease and Rent Control) Act, was meant to be a self-contained code in the matter of prescribing the periods of limitation and granting exemption therefrom."

Thus it is clear from the abovesaid decision that the Appellate Authority constituted under the Rent Control Act is only a *persona designata* and that the provisions of the Limitation Act cannot be invoked before such authorities.

1. (1974) T.L.N.J. 380.

1. A.I.R. 1974 Ker. 162 (F.B.).

5. In *Abdul Wahid* v. *Abdul Khader*[1], Yahya Ali, J., held that District Judges and Subordinate Judges invested with the powers of appellate authorities under section 12 of the Madras Buildings (Lease and Rent Control) Act (XV of 1946), by notification issued under that section function as *persona designata* and not as Courts subordinate to the High Court and that an application for transfer of appeal before such authority cannot therefore be maintained in the High Court.

6. To the same effect, Clark, J., has held in *Chinniah Thevar* v. *P. M. Badsha*[2], that a Subordinate Judge notified under section 12 of the Act as the appellate authority, is appointed as a *persona designata* and not as a Court and as such he is not a ' Court ' subordinate to the High Court for the purposes of section 115, Civil Procedure Code.

7. In *J. Easwaran* v. *Palaniammal*[3], N. S. Ramaswami, J., has held that sections 5 and 29 of the Limitation Act will not apply either to rent control proceedings or to the appeal therefrom and that the authorities constituted both as Rent Controller and Appellate Authority are *persona designata*, and not Courts.

8. Mack, J., has clearly held in *Rajan Ayyar* v. *Pavanambal*[4], that the appellate authority constituted under section 12 (1) of the Act XV of 1946 is a *persona designata* and not a Court subordinate to the High Court.

9. In *M. Joshi* v. *Life Insurance Corporation of India*[5] and *Athani Municipality* v. *Labour Court, Hubli*[6], the Supreme Court held that Article 137 of the Limitation Act (XXXVI of 1963), cannot be invoked for an application under section 33-C (2) of the Industrial Disputes Act (XIV of 1947). The Supreme Court observed:

> " The scope of the various articles in this division cannot be held to have been so enlarged as to include within them applications to bodies other than Courts, such as a quasi-judicial Tribunal, or even an executive authority. An Industrial Tribunal or a Labour Court dealing with applications or references under the Act are not Courts and they are in no way governed either by the Code of Civil Procedure or the Code of Criminal Procedure."

1. I.L.R. (1948) Mad. 43: (1947) 1 M.L.J. 207 : A.I.R. 1947 Mad. 400.
2. (1948) 1 M.L.J. 314 : A.I.R. 1948 Mad. 439.
3. (1974) T.L.N.J. 380.
4. A.I.R. 1929 Mad. 287.
5. (1969) 2 S.C.J. 749 : (1970) 1 S.C.R. 396: A.I.R. 1970 S.C. 209.
6. (1970) 1 S.C.J. 1 : (1970) 1 S.C.R. 51: A.I.R. 1969 S.C. 1335.

In *Sankar* v. *Bhuvanambal Ammal*[1], a Division Bench of this Court, to which I was a party, held that a Rent Controller appointed as per the provisions in section 2 (3) of the Rent Control Act is a *persona designata*. No doubt, in this Bench decision, we have not considered the question as to whether the Appellate Authority constituted as per section 23 of the Act is a *persona designata* or not.

10. In *Venugopal* v. *Third Judge, Sm. C.C., Madras*[2] a Division Bench of this Court, dealing with the Notification under section 12 (1) (*a*) of Act XV of 1946, dated 1st March, 1948, and published in the *Fort St. George Gazette* on 23rd March, 1948, which substituted the words " Court of Small Causes " in place of the words " the Chief Judge of the Court of Small Causes" in the original Notification, held that by such notification, only " the Court of Small Causes " was constituted, and, as such, it was *intra vires*, and not a *persona designata*. But in the case on hand, and under the provisions of the Tamil Nadu Act (XVIII of 1960), by Notification II No. 30006 (*f*) of 1973, published in the *Tamil Nadu Government Gazette*, Extraordinary, Part II, section 1, dated the 30th June, 1973 at page 3, the Principal Subordinate Judge, Madurai, has been conferred with the powers of Appellate Authority for the purpose of the Act in respect of cases arising in the City of Madurai. It is significant to note that in *Venugopal* v. *Third Judge. Sm. C.C., Madras*[2], the word used in the Notification referred therein is " the Court of Small Causes ", while, as per the present Act, the power has been conferred upon the

1. (1971) 84 L.W. 134 : (1971) 1 M.L.J. 230: A.I.R. 1971 Mad. 368.
2. (1949) 1 M.L.J. 471 : I.L.R. (1950) Mad. 28: A.I.R. 1949 Mad. 776.

"Principal Subordinate Judge" according to the Notification now in force. Thus it is clear that the power is vested upon the Principal Subordinate Judge, and not upon the Court as the law stands as at present.

11. In *A. Pafeeq Ahmed Sahib* v. *Istiaq Ahmed*[1], Somasundaram, J., dealing with section 195 (1) and (2), Criminal Procedure Code, held that a complaint from a party in rent control proceedings for the offence of forgery etc., is not sustainable but there must be a complaint by the Court to the Magistrate. The learned Judge observed:

> "In view of the legislative intention clearly expressed in the sub-section there is every reason to include the Rent Controller and the Appellate Authority within the definition of the term 'Court' as given in section 195 (2), Criminal Procedure Code, as these Tribunals have far greater trappings of a Court than a Registrar or a Sub-Registrar under the Indian Registration Act. Thus, section 195 (1), Criminal Procedure Code, is a bar to the present proceedings. There must be a complaint by the Court."

I do not think the principle in the above decision can be applied to the present case. In that case 'Appellate Authority' is construed as a Court with reference to section 195 (2) of the Code of Criminal Procedure.

12. No doubt, a single Judge of the Andhra Pradesh High Court has held in *G. D. M. Rao* v. *Ranga Pansiah & Bros.*[2], that a Rent Controller acting under the Rent Control Act is a Court and the provisions of section 5 of the Limitation Act are applicable to the proceedings before the Rent Controller under the Act. I am not inclined to follow this decision in view of the direct authority, both by a single Judge and by a Division Bench of our High Court to the effect that a Rent Controller constituted under the Tamil Nadu Buildings (Lease and Rent Control) Act is only a *persona designata* and not a Court.

1. (1975) 88 L.W. 135.
2. A.I.R. 1975 A.P. 13.

13. In *Central Talkies Ltd.* v. *Dwarka Prasad*[1], the Supreme Court has held:

> "The argument that the District Magistrate was a *persona designata* cannot be accepted. Under the definition of 'District Magistrate', the special authorisation by the District Magistrate had the effect of creating officers exercising the powers of a District Magistrate under the Eviction Act. To that extent, those officers would, on authorisation, be equated to the District Magistrate. A *persona designata* is 'a person who is pointed out or described as an individual, as opposed to a person ascertained as a member of class, or as filling a particular character ...." *persona designata* are "persons selected to act in their private capacity and not in their capacity as Judges". The same consideration applies also to a well-known officer like the District Magistrate named by virtue of his Office, and whose powers the Additional District Magistrate can also exercise and who can create other officers equal to himself for the purpose of the Evidence Act."

I do not think the principle enunciated in the above decision can be invoked in the present case to come to the conclusion that the principal Subordinate Judge appointed as Appellate Authority by virtue of the Notification under the Act, can be considered as a Court. In the above decision, the Notification dealt with conferred on the Additional District Magistrate all or any of the powers of the District Magistrate under the Code or any law for the time being in force as the provincial Government may direct. In those circumstances, the Supreme Court held that 'District Magistrate' referred to in the Notification cannot be considered as *persona designata*. But in our case, among the Subordinate Judges at Madurai City, only the Principal Subordinate Judge has been invested with the powers of appellate jurisdiction for the purposes of the Act by the notification.

14. In contrast to the Full Bench decision of the Kerala High Court reported

1. (1962) 2 S.C.J. 41 : (1961) 3 S.C.R. 495 : A.I.R. 1961 S.C. 606.

in *J. Fernandez* v. *A. K. Umma*[1], a Division Bench of the Calcutta High Court in *Imperial Bucket Co.* v. *Sm. Bhagwati Basik*[2], has held:

> " The words ' suit , appeal or application ' occurring in section 29 (2) (*a*) (of the Limitation Act) do not admit of any doubt or dispute. In this view no reference to the preamble is necessary. Even if there was any doubt about this matter, the words must be construed on the principle, that the Limitation Act being an Act which takes away or restricts the right to take legal proceedings must, when the language is ambiguous be construed strictly, *i.e.*, in favour of the right to proceed. The rules of construction do not justify the Court in adding to the words ' suit, appeal or application ' the words 'to Courts'. In their plain meaning the words ' suit, or appeal ' in section 29 (2) (*a*) refer to any suit or any appeal be it filed in a Court or before a ' *persona designata*'."

To the same effect is the decision rendered by a Division Bench of the Bombay High Court in *Vasanji Chela & Co.* v. *State of Maharashtra*[3]. I am not inclined to follow the ruling in the above two decisions in view of the principles enunciated in *J. Fernandez* v. *A. K. Umma*[1].

15. There are a number of cases wherein the Courts including the Supreme Court sought to consider certain Authorities as ' Courts ' on the powers conferred on such Authorities. If a particular Authority is invested with all the trappings of a Court, the Courts have come to the conclusion that such Authority is a Court. The State Government has power to invest judicial functions upon such Authorities which it creates. Thus, each case has to depend upon the nature and scope of the legislation which creates such Authority.

16. As far as Rent Controller and Appellate Authority created under the Tamil Nadu Buildings (Lease and Rent Control) Act are concerned, it is clear that such Authorities are *persona designata* and legislations such as the Limitation Act applicable to 'Court' cannot be invoked in proceedings before such *persona designata*. N. S. Ramaswami, J. in C.R.P. No. 1044 of 1974, dated 12th August, 1974 has categorically held that the Appellate Authority constituted under the Rent Control Act is a *persona designata* and as such section 5 of the Limitation Act cannot be invoked before such Authority. Further, the Act itself is compact and provides the period of limitation for preferring appeals including the right of the appellant to exclude the time taken to obtain the certified copy of the order sought to be appealed, for computing the period of limitation.

17. In view of the above discussion and the decisions referred, I am in complete agreement with the principle laid down by N. S. Ramaswami, J. in C.R.P. No. 1044 of 1974. (*J. Easwaran* v. *Palaniammal*[1].)

18. In these circumstances, the civil revision petition is dismissed. There will be no order as to costs. Time to vacate three months.

S.J. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*V. Sethuraman, J.*

S. A. Ramiah Nadar and another .. *Appellants**

v.

Rajalakshmi Ammal and another .. *Respondents.*

Mortgage—Suit on—Right of redemption—Amount due on demand according to deed—When money becomes due—Limitation Act (XXXVI of 1963), Article 63.

Where a date is fixed for redemption of a mortgage and in default of such redemption on that date, it is agreed that the mortgagor will pay the amount whenever

1. A.I.R. 1974 Ker. 162 (F.B.).
2. A.I.R. 1954 Cal. 520.
3. (1968) 22 S.T.C. 104.

1. (1974) T.L. N.J. 380.
*S.A.No. 287 of 1972.

28th February, 1975.

demanded and redeem or discharge the mortgage, the mortgage money became due at the time when the period fixed for redemption by the mortgagor expired. The agreement to pay whenever demanded did not mean that demand was a condition so that it became due only on that date. [*Para.* 9.]

Cases referred to:—

Narayana Chettiar v. *Rangaswami Naidu and others,* (1968) 2 M.L.J. 445; *Vaithilinga Nadar and another* v. *Narayanasami Ayyan and others,* (1906) 16 M.L.J. 364 ; *Vali Venkataswami Chettiar* v. *Ramalingam,* (1945) 1 M.L.J. 233 : I.L.R. (1945) Mad. 758 : A.I.R. 1945 Mad. 157.

Appeal against the decree of the Principal Subordinate Judge, Madurai in Appeal Suit No. 10 of 1970, preferred against the decree of the Court of the District Munsif of Tirumangalam in Original Suit No. 320 of 1969.

A. Varadarajan, for Appellants.

M. V. Krishnan, for Respondents.

The Court delivered the following

JUDGMENT.—The defendants have filed this appeal. The plaintiffs filed the suit for recovery of a sum of Rs. 600 due on a mortgage deed, dated 19th November, 1951 which is Exhibit A-1 in the case. It recites that the house property described in the schedule was usufructuarily mortgaged for a loan for discharging certain debts incurred in connection with the business. It gives a right to redeem the mortgage to the mortgagor on or before 30th Kartikai of next year which corresponds to 14th December, 1952. In default of such redemption on that date, it is agreed that the mortgagor will pay the amount whenever demanded and redeem or discharge the mortgage.

2. The present suit was filed on 19th July, 1969. The defendants-appellants objected to the maintainability of the suit on the ground that it was barred by limitation under Article 62 of the Limitation Act, 1963.

3. The Trial Court accepted the objection of the defendants and dismissed the suit. On appeal the learned Subordinate Judge, following the decision in *Narayana Chettiar* v. *Rangaswamy Naidu and others*[1], held the period of limitation would start running only from the date of demand, that in the present case the demand was on 25th July, 1968, and that therefore the suit was within time. He distinguished the decision in *Narayana Chettiar* v. *Rangaswamy Naidu and others*[1], on the ground that it was inconsistent with the earlier Bench decision in *Vaithilinga Nadar and another* v. *Narayanaswami Ayyan and others*[2]. He therefore, passed a preliminary decree for the amount due and fixed the time for payment as three months.

4. In the present appeal the learned counsel for the appellants submitted that the Court below was wrong in proceeding as if the suit was within time, that the suit should have been filed either within the period of 12 years from 19th November, 1951 when the mortgage deed was executed, or within the period of 12 years from 14th December 1952, the date fixed for redemption and that as the suit had been filed much later than the period of 12 years from either of these two dates, it was barred by limitation under Article 62 of the Limitation Act. The learned counsel for the respondents supported the decision of the learned Subordinate Judge on the ground that the decision in *Vaithilinga Nadar's case*[2], was rightly applied.

5. Article 62 of the Limitation Act deals with suits to enforce payment of money secured by mortgage or otherwise charged upon immovable property. The period of limitation is 12 years from the date when the money sued for became due. I have thus, first to see as to when the money sued for became due. If the demand made by the mortgagee is to be the starting point of limitation, then certainly the suit would be within time. It is on this aspect that I have to consider the decisions brought to my notice.

6. In *Vaithilinga Nadar and another* v. *Narayanasami Ayyan and others*[2], a Bench of this Court was concerned with the construction of the words "on demand". That was a case of a mortgage document

1. (1968) 2 M.L.J. 445.
2. (1906) 16 M.L.J. 364.

dated 15th September, 1878, providing for payment of interest on the 15th of September, each year and payment of the principal on the fifth year. If the amount was not paid then, the mortgagor undertook to pay the amount on demand. The default in payment took place in 1879 and the plaint was presented on 14th September, 1895. It was held that the words " on demand " were intended to import a condition that the demand fell within the period, and that therefore the suit was not barred by the law of limitation.

7. The same question came up for consideration in a number of cases later on and there was some difference of opinion, so that the matter came to be referred to a Full Bench, whose decision is reported in *Vali Venkataswami Chettiar* v. *Ramalingam*[1]. In that case the mortgage bond provided that the mortgage money would be payable whenever demanded. The mortgaged property was sold, but the amount realised was not sufficient to discharge the full liability. The mortgage deed had been executed on 2nd June, 1931, and the suit to enforce the payment was filed on 22nd February, 1938. As more than six years had elapsed from the date of the mortgage deed, the trial Court dismissed the suit on the ground that the application for a personal decree had been filed out of time. The question before the Full Bench was whether the suit filed beyond the period of six years from the date of the instrument was within time. After noticing the earlier decisions on the point, at page 770 it was observed :

> " Without hesitation we accept as being correct the decisions of this Court which say that when a mortgage bond provides that the mortgage money shall be payable on demand it becomes repayable at once and limitation starts from the date of the bond."

The decision in *Vaithilinga Nadar and another* v. *Narayanasami Ayyan and others*[2], is inconsistent with this decision of the Full Bench and cannot, therefore, be treated as good law.

1. I.L.R. (1945) Mad. 758: (1945) 1 M.L.J 233: A.I.R. 1945 Mad. 157.
2. (1906) 16 M.L.J. 364.

8. Though it is unnecessary to cite any further decision after the Full Bench decision mentioned above, I may, however, refer to a decision of a learned single Judge of this Court in *Narayana Chettiar* v. *Rangaswamy Naidu and others*[1]. In that case the mortgage document was a combination of a simple mortgage and usufructuary mortgage containing a personal covenant for payment. On the date of the mortgage itself the mortgaged properties were leased by the mortgagees to the mortgagor for a period of five years from 17th May, 1927. The mortgagee demanded the amount in 1959, that is, 32 years after the execution of the mortgage deed. Thereafter he filed a suit. It was held that the starting point of limitation under Article 132, which was the corresponding Article under the Limitation Act of 1908, was when the money sued for became due. It was contended that so far as the personal covenant was concerned, the money did not become due till demand for the money was made. It was held that the money became payable on the expiry of the five year period. If the contention, that the money became due only on demand by the the mortgagee, was accepted, it was pointed out that the mortgagee, by not making the demand, could postpone redemption and that the clause would then become a clog on redemption. This contention was, therefore, rejected.

9. The result of the above discussion is that the mortgage money became due at the time when the period fixed for redemption by the mortgagor expired. The agreement to pay whenever demanded did not mean that demand was a condition so that it became due only on that date. In the present case, the amount became due on 14th December, 1952 when the period fixed for redemption came to an end. The suit should have been filed within a period of 12 years thereafter. As it was not so filed, the suit was rightly dismissed by the trial Court. The decision to the contrary by the learned Subordinate Judge is, therefore not correct. This appeal is, therefore, allowed and the judgment and

1. (1968) 2 M.L.J. 445.

decree of the Trial Court are restored. No costs in second appeal. No leave.

S.J. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*K. S. Venkataraman and S. Maharajan, JJ.*

A. N. Ramaswami Iyer and others .. *Appellants**

v.

The Commissioner, The Hindu Religious and Charitable Endowments (Administration), Madras and another .. *Respondents.*

Madras Hindu Religious and Charitable Endowments Act (XXII of 1959), *section* 6 (22)—" *Trustee* "—*Body of persons—Community fluctuating body—Whether can be trustee—Body of trustees—Appointment of one or some by election to manage temple—Effect.*

There is nothing in the definition of the word " trustee ", which would deprive a body of persons of their right of trusteeship merely because that body is likely to fluctuate from time to time.

[*Para.* 8.]

The mere fact that the community who have been hereditarily exercising the right of managing and administering a temple comprises a large body of individuals cannot take away from them the right of hereditary trusteeship. All of them would be co-trustees of the temple. If any of them dies the right of co-trusteeship would devolve on his heir. The circumstance that for efficient administration the general body of trustees has been appointing by election one or more among them to manage the temple does not detract from their status as joint trustees nor can it confer any exclusive right of trusteeship, much less a hereditary trusteeship, upon the person appointed by them. [*Para.* 10.]

Cases referred to :—

The Secretary of State v. *Haibatrao Hari,* I.L.R. (1904) 28 Bom. 270 ; *Muthia Asari* v. *Madasami Asari,* (1965) 2 M.L.J. 226 ; *Manathunainatha* v. *Sundaralingam,* (1970) 2 M.L.J. 156 : A.I.R. 1971 Mad. 1 ; *Muthirula Pillai* v. *Thyagarajaswami Pillai,* (1964) 1 M.L.J. 230 ; *Sambandamurthi Mudaliar* v. *State of Madras,* (1970) 2 M.L.J. 58.

Appeal against the decree of the Additional Subordinate Judge, Tirunelveli in Original Suit No. 79 of 1963.

K. Sarvabhauman and *T. R. Mani,* for Appellants.

The Additional Government Pleader, for Respondents.

The Judgment of the Court was delivered by

Maharajan, J.—The plaintiffs have preferred this appeal against the judgment of the learned Subordinate Judge of Tirunelveli, dismissing their suit with costs of the contesting first defendant. The suit itself was filed by the plaintiffs for themselves and as members of the Committee of the Agraharam Pothu Dharmam *alias* Dharma Paripalana Sabha of Vadakku Ariyanayagipuram, against the Commissioner of the Hindu Religious and Charitable Endowments (Administration), Madras (the first defendant), and the Executive Officer, Sri Kailasanathaswami Devasthanam, Ariyanayagipuram (the second defendant), for setting aside the order of the first defendant dated 10th May, 1963 in Appeal No. 45 of 1962. The case of the plaintiffs was as follows : In the village of Ariyanayagipuram in Tirunelveli District are situate two temples ; one is a Siva temple called Sri Kailasanathaswami Devasthanam, and the other a Vishnu temple known as Venkatachalapathi Devasthanam. Sri Kailasanathaswami Devasthanam is the richer of the two Devasthanams and is possessed of considerable endowments and has been under the management of the trustees appointed from time to time under the Tamil Nadu Act II of 1927 and Act XIX of 1951, while Venkatachalapathi Devasthanam has been customarily and from time immemorial

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* Appeal No. 711 of 1967. 21*st January,* 1975.

under the continuous and exclusive management and control of the resident Brahmin community of the village. The plaintiffs are the present members of the managing committee of the Agraharam Pothu Dharmam known as Dharma Paripalana Sabha, having been selected thereto by the Brahmin residents of the village. The village Brahmin community has been from time immemorial in exclusive control and management of Sri Venkatachalapathi Devasthanam and has been functioning through a managing committee selected by the said community from year to year. From time immemorial, Sri Kailasanathaswami Devasthanam was making an anual contribution of 8 kottas of paddy and Rs. 30 to Sri Venkatachalapathi Devasthanam of the village. But, this contribution was stopped by the then trustee of Sri Kailasanathaswami Devasthanam in 1953-54, on the ground that Sri Venkatachalapathi Devasthanam was an independent one and the trusteeship thereof was hereditary in the Brahmin community of the village. On a complaint from the Secretary, Dharma Paripalana Sabha, the Assistant Commissioner, Hindu Religious and Charitable Endowments (Administration), Tirunelvely, by his proceedings dated 19th March, 1956 restored the contribution with a direction to the person or persons interested in Sri Venkatachalapathi temple to move the Deputy Commissioner for a declaration that the trusteeship of Sri Venkatachalapathi Devasthanam is hereditary within the meaning of section 57 (*b*) of the Tamil Nadu Act XIX of 1951. The Assistant Commissioner also suggested that a decision from the same Tribunal might be obtained as to whether or not the said Sri Venkatachalapathi Devasthanam was a sub-temple of Sri Kailasanathaswami Devasthanam of the village. In pursuance of the said direction, the then members of the managing committee of the Dharma Paripalana Sabha filed O. A. No. 110 of 1956 before the Deputy Commissioner, Hindu Religious and Charitable Endowments, Thanjavur. By order dated 16th August, 1957 the Deputy Commissioner dismissed the application after holding that Sri Venkatachalapathi Devasthanam was a sub-temple of Sri Kailasanathaswami Devasthanam, and that it had not been established that the office of trusteeship and management of the said temple was hereditary. An appeal was filed by the Dharma Paripalana Sabha to the Commissioner of the Hindu Religious and Charitable Endowments, Madras, who set aside the order of the Deputy Commissioner and remanded the matter to him for fresh disposal. After remand, the Deputy Commissioner, after hearing the parties, held by his order dated 26th February, 1962 that Sri Venkatachalapathi Devasthanam was not a sub-temple of Sri Kailasanathaswami Devasthanam and that the claim of hereditary trusteeship made by the Brahmin community was untenable. The plaintiffs preferred an appeal, Appeal No. 45 of 1962, to the Commissioner, Hindu Religious and Charitable Endowments, Madras, against that part of the order which held that the trusteeship of Sri Venkatachalapathi temple was not hereditary under section 6 (9) of the Tamil Nadu Act XIX of 1959. The appeal was dismissed on 10th May, 1963. According to the plaintiffs, the order of the Commissioner disregarded the unimpeachable evidence on record to the effect that succession to the management and trusteeship of Sri Venkatachalapathi Devasthanam has been regulated by usage from time immemorial, and consequently, the office of trusteeship is hereditary. The suit was filed in the Court below for setting aside the order of the Commissioner in Appeal No. 45 of 1962.

2. The first defendant filed an answer in which he contended *inter alia* that the suit was barred by limitation, that the succession to the office of trusteeship of the plaint-mentioned Devasthanam was not regulated by any ancient or definite usage and that the order of the first defendant was not, therefore, liable to be set side.

3. The second defendant filed a memo. adopting the written statement of the first defendant.

4. The learned Subordinate Judge held that the suit was not barred by time, that the plaintiffs had failed to establish that they were the hereditary trustees of the suit temple, and that consequently

the order of the first defendant was not liable to be set aside. On this basis, the suit was dismissed with costs of the contesting first defendant.

5. The main question that arises for consideration is, whether the resident Brahmin community of Ariyanayagipuram are the hereditary trustees of Sri Venkatachalapathi Devasthanam.

6. In paragraph 8 of the judgment, the learned Subordinate Judge observes :

> "No doubt, Exhibits A-3, and A-49 would show that right from 1927 the Brahmin residents of Vadakku Ariyanayagipuram used to meet from time to time, *i.e.*, once a year and select a maximum of 5 persons for carrying on the management and administer the affairs of the temple and those 5 persons from among themselves elected a secretary, a treasurer and so on for attending to the day to day affairs of the temple like writing accounts, issuing receipts, payment of kist, collection of income etc. First defendant did not seriously dispute the truth or genuineness of the entries found in the documents, not even those in the minutes books. Further, they are ancient documents which need no proof."

Though we agree that the above statements are correct and are warranted by the evidence on record, we think that the learned Subordinate Judge erred in excluding Exhibit A-8 from consideration. Exhibit A-8 is a hand-copy of a document filed by the plaintiffs, and marked as Exhibit A-1 in O. A. No. 82 of 1960. In fact, in his annexure to the order dated 17th March, 1962 in O. A. No. 82 of 1960, the Deputy Commissioner has referred to the original of Exhibit A-8, and made the following observations :—

> "The evidence adduced on behalf of the petitioners go to show that at least from 1906 persons who command the confidence of the Brahmin residents of the village had from time to time been managing the affairs of the temple, receiving the contributions given by the Siva temple and managing the other properties of the temple. According to Exhibit A-1, it is shown that one Muthuswamy Iyer was nominated to look after the affairs of the temple by the Brahmin residents. The document authorising this man is styled as a consent letter and bears the signature of about five persons in the village."

From these observations, it is clear that the original was filed as Exhibit A-1 before the Deputy Commissioner, who, in his order, has abstracted the contents thereof. Though the original was summoned by the plaintiffs, the Deputy Commissioner failed to produce the same. In these circumstances, the plaintiffs were entitled to adduce secondary evidence of the document, the original of which was filed before the Deputy Commissioner and has somehow been mislaid or lost in his office. The third plaintiff, who is a respectible person and whose integrity is not questioned by the respondents' Advocate, has certified that Exhibit A-8 is a true copy of the original dated 22nd Panguni 1081 (corresponding to 15th March, 1906). It shows that the Grama Mahajanangal of Ariyanayagipuram, meaning the Brahmin community of Ariyanayagipuram, have asserted their title to the village Sastha temple and Sri Venkatachalapathiswami temple and after dismissing one Subbier, who was managing the affairs of both the temples on behalf of the Brahmin community, appointed another man to look after the affairs of the temples and directed him to keep proper accounts of the transactions thereof. It is, therefore, clear that at least from 1906, the management of Sri Venkatachalapathi Devasthanam has been in the hands of the Brahmin residents of Vadakku Ariyanayagipuram. As all the members of the community could not directly conduct the affairs of the temple, they seem to have been periodically appointting one or more of their delegates for the management and administration of the temple, as shown by the documents from 1906 upto-date (*vide* Exhibits A-8 and A-39 to A-41). It is not disputed that the right of the Brahmin community of the village to manage the temple was ever challenged within living memory. If, since 1906, the members of the Brahmin community of the village have been exercising their right of management upto-date, it is but reasonable to presume, in the absence of

any contrary evidence, that they have been in management of the temple from time immemorial. It is a sound principle of law that where there has been a well-established user, extending over a long series of years, it is the duty of the Court, if possible, to find a legal origin for the existing facts. It is not improbable that the members of the Brahmin community of the village actually founded the temple at some point of time, which is lost in the mists of antiquity, and that is why they have been hereditarily managing the affairs of the temple. Under section 6, clause (22) of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959,

> " 'trustee ', means any person or body by whatever designation known in whom or in which the administration of a religious institution is vested, and includes any person or body who or which is liable as if such person or body were a trustee ;".

It is clear from this definition that a body of persons, such as the Brahmin community of the Ariyanayagipuram village, can be a trustee of the temple, provided the administration of the temple is vested in them. The learned Subordinate Judge refused to regard the whole community as trustee of the temple, mainly for the reason that it would be a fluctuating body. We think there is nothing in the definition of the word " trustee ", which would deprive a body of persons of their right of trusteeship merely because that body is likely to fluctuate from time to time.

7. In *The Secretary of State* v. *Haibatrao Hari*[1], Jenkins, C.J., observed as follows:

> "There can be no doubt that the law of the country recognised fluctuating communities as legal *personae* capable of owning property, as for instance, the caste, and the village. "

We think that the above statement represents the correct position of law. If a whole village is capable of owning property, notwithstanding the fact that the collectivity called the village, is necessarily a fluctuating body, we see little reason why such a fluctuating body cannot hold the right of administering and managing the temple and being the trustee thereof.

1. I.L.R. (1904) 28 Bom. 270 at 283.

8. In a case, *Muthia Asari* v. *Madasami Asari*[1], where the members of the Viswakarma Brahmin community relating to five named villages in a particular District claimed the right to manage a temple and to administer its endowments, a Division Bench of this High Court observed:—

> " Undoubtedly, the rights of this body will be entitled to protection under Article 26 of the Constitution, particularly, sub-clause (*d*). The right of any corporate body, with regard to a denominational religious institution, to have its functions preserved from invasion, under Article 26 of the Constitution, has been statutorily embodied in section 107 of Madras Act XXII of 1959. "

In *Manathunainatha* v. *Sundaralingam*[2], a Full Bench of this Court has observed that the office of the Dharmakartha may be held by a single member, or by a number of persons, or by a family or by a number of families, and they added, " At places, the superintendence of the village temple is found vested in the entire village community."

9. If the right of superintendence or administration of the suit temple validly vests in the Brahmin community of Ariyanayagipuram, there can be little doubt that this community is the body which will be regarded as a trustee of the temple within the meaning of section 6, clause (22) of the Tamil Nadu Act XXII of 1959. Clause (11) of the said section defines " hereditary trustee " to mean,

> " the trustee of a religious institution, the succession to whose office devolves by hereditary right or is regulated by usage or is specifically provided for by the founder, so long as such scheme of succession is in force. "

There are three limbs to this definition. A trustee will be regarded as hereditary trustee, if the succession to his office :

(1) devolves by hereditary right; or

1. (1965) 2 M.L.J. 226.
2. (1970) 2 M.L.J. 156 : 83 L.W. 640 : I.L.R. (1970) 3 Mad. 624 : A.I.R. 1971 Mad. 1 at 8.

(2) is regulated by usage; or

(3) is specifically provided for by the founder.

It is necessary to read these three qualifying clauses disjunctively without allowing the concept derived from the one to telescope into and obscure the concept derived from either of the other two. The question to ask is, if the entire resident Brahmin community of Ariyanayagipuram is, as we have found, the trustee of the suit temple, does the succession to that office of trustee devolve by hereditary right? If so, the entire body of Brahmin residents of the disputed temple should be regarded as hereditary trustees. Numerous authorities have been cited before us in which the status of hereditary trusteeship has been considered by Courts. But, in none of them has it been held that a body of trustees such as a particular caste or village is disentitled to be hereditary trustees.

10. For instance in the case reported in *Muthirula Pillai* v. *Thyagarajaswami Pillai*[1], a large number of persons, called Koilkudigals were the joint trustees of Sri Gurunathaswami temple. Reminiscent of the practice of the Brahmins of Ariyanayagipuram, the general body of the Koilkudigals met in 1926, and for the purpose of convenient management, elected one Muthirula Pillai as trustee to manage the temple. The said Muthirula Pillai claimed that he had acquired a hereditary right to the office of the trustee. This claim was rejected by a Division Bench of this High Court consisting of Ramachandra Iyer, C.J. and Ramamurti, J., with the following observations:

" It is said that, in 1926, the appellant was elected by the general body of Koilkudigals as a trustee. On this basis, he claimed that he had acquired a hereditary right to the office of trustee. We are, however, unable to see how that can follow. If the Koilkudigals are deemed to be the hereditary trustees, the *mere fact that they comprised a large body of individuals cannot take away that right from them. All of them would be joint trustees.* The office will thus be a joint one, the co-trustees forming, as it were, one collective trustee. But if they, for the purpose of convenient management, elected one from amongst themselves as a trustee, it must have been only to facilitate the management of the temple and its properties. Such election by itself cannot confer any exclusive right of trusteeship, much less a hereditary right to trusteeship. Indeed, it would really be the other way about. The appellant, by virtue of his election, can hold office only under the rights created by such election, and that cannot be regarded as in any way creating a hereditary right. The office of trustee, as we said, was a joint one, and it would not be open for the general body to alienate the office in such a way as to create a hereditary right in one amongst themselves. "

The above observations throw a flood of light upon the legal position of the plaintiffs in this case. It is not the persons, who were being periodically elected or appointed by the general body of the Brahmin community of Ariyanayagipuram, that have come forward, in this suit, for recognition of their hereditary right. On the other hand, the plaintiffs represent the entire community of Brahmins of the village, who have been hereditarily exercising the right of managing and administering the suit temple. The mere fact that they comprise a large body of individuals cannot take away from them the right of hereditary trusteeship. All of them would be co-trustees of the temple. If any of them dies, his right of co-trusteeship would devolve upon his heir. This would be true of every member of the Brahmin community of Ariyanayagipuram at any point of time. Deaths may decrease, and births may increase the number of co-trustees entitled to manage the temple. But the succession to the general body of the trustees of the institution undoubtedly devolves by hereditary right and the circumstance that for efficient administration the general body of trustees has been appointing by election one or more among them to manage the temple does not in any manner detract from their status as joint trustees, nor can it confer any exclusive right of trusteeship, much less a hereditary right of trusteeship upon the person appointed by them.

1. (1964) 1 M.L.J. 230.

11. Reference was made in the course of arguments to a ruling of the Supreme Court in *Sambandamurthi Mudaliar* v. *State of Madras*[1]. That case related to the trusteeship of the Kumaran Koil in Manjakollai village. The temple had been founded 200 years ago by the members of the Seguntha Mudaliar Community of Manjakollai village and ever since its inception, the management of the temple and its affairs was always vested in the community of Senguntha Mudaliars, and no person other than the elected trustee had at any time the right of management and control of the temple. One Sambandamurthi Mudaliar, the appellant in that case, claimed to be the hereditary trustee within the meaning of section 6 (9) of Tamil Nadu Act XIX of 1951. His contention was that according to the usage of the temple, the members of the SengunathaMudaliar community annually elected the trustee of the temple, and he having been elected as such must be regarded as a hereditary trustee because the office of trustee was "regulated by usage", within the meaning of section 6 (9) of the Act.. This contention was repelled by the Supreme Court on the ground that the phrase "regulated by usage" in section 6 (9) must be construed along with the phrase "succession to whose office", and when so construed that part of the definition would only apply where the ordinary rules of succession under the Hindu Law are modified by usage, and succession has to be determined in accordance with the modified rules. If instead of Sambandamurthi Mudaliar, the person who was elected by the general body of the trustees, the general body of the trustees themselves had in that case claimed hereditary trusteeship, there can be no doubt that the Supreme Court would have recognised their claim because they would clearly fall under the first clause of the definition. Their Lordships also cited with approval Black's Law Dictionary, in which the word "succession" is defined as follows:

> "The devolution of title to property under the law of descent and distribution. *The right by which one set of men may, by succeeding another set, acquire a property in all the goods, movables, and other chattels of a corporation.* The fact of the transmission of the rights, estate, obligations, and charges of a deceased person to his heir or heirs."

Judging the right claimed by the plaintiffs in this case in the light of this definition, there can be no doubt that succession to the right of trusteeship of Sri Venkatachalapathi Devasthanam devolves hereditarily within the meaning of clause (22) of section 6 of the Tamil Nadu Act XXII of 1959. In other words, the right of co-trusteeship possessed by every member of the Brahmin community of Ariyanayagipuram at any point of time has been devolving from time immemorial on the death of that person on his heir or heirs. We, therefore, reverse, the finding of the trial Court and hold that the Brahmin Mahajanangal of the Village of Ariyanayagipuram, are the hereditary trustees of Sri Venkatachalapathi temple of that village. We may also note, in this connection, the finding of the trial Court at page 11 of its printed judgment which is in the following words:

> "It was, therefore, clear that, in the instant case, the plaintiffs, *who succeeded in establisihing that there has been an usage recognising all the resident members of the brahmin community as trustees and all of them as entitled to the office of trusteeship and all of them as entitled to be trustees while their forefathers and progenies were also trustees by reason of their residence and age* could not be treated as having established that the succession to the office of trusteeship of the Vishnu temple is regulated by usage because the usage is not something which can be reduced to any formula."

It may be noticed that even according to the trial Court, the plaintiffs have succeeded in establlishing that there has been a usage recognising the members of the Brahmin community of the village as hereditary trustees of the temple. We confirm this finding. But we, disagree with the later part of the observation of the learned Subordinate Judge to the effect that inspite of the plaintiffs succeeding in establishing this usage, they must fail, because " the usage is not something which can be reduced to any formula". It is difficult to accept the assumption of

1. (1970) 2 M.L.J. 58.

the learned Subordinate Judge that usage is not usage unless it can be reduced to a formula. What he evidently meant was that the Brahmin community is a body which fluctuates from time to time and cannot, therefore, be regarded as a determinate entity. As we have already observed at the inception, the law of the country has always recognised fluctuating communities as legal *personae* capable of owning rights. It was, therefore, wrong for the lower Court to have held that the fluctuating character of the community would have the effect of depriving it of its legal rights. We consequently reverse the judgment of the Court below and decree the plaintiffs' suit as prayed for with costs throughout.

S.J. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*T. Ramaprasada Rao and S. Maharajan, JJ.*

Kandaswami Chettiar and others .. *Appellants**

v.

Gopal Chettiar and others .. *Respondents.*

(*A*) *Hindu Law—Property standing in the name of female member or manager of the joint family—Whether joint family property or separate property—Presumption—Burden of proof.*

(*B*) *Preliminary decree—Rights and liabilities of parties not determined—Relegated to final decree proceedings—Whether correct—Duty of Court.*

If a coparcener desires to establish that a property in the name of a female member of the family or in the name of the manager himself has to be accepted and treated as property acquired from the joint family nucleus, it is absolutely essential that such a coparcener should not only barely plead the same, but also establish the existence of such a joint family fund or nucleus. Even if the joint family nucleus is so established, the prescription that the accretions made by the manager or the purchases made by him should be deemed to be from and out of such a nucleus does not arise, if there is no proof that such nucleus of the joint family is not an income-yielding apparatus. The proof required is very strict and the burden is on the person who sets up a case that the property in the name of a female member of the family or in the name of the manager or any other coparcener is to be treated as joint family property. There should be proof of the availability of such surplus income or joint family nucleus on the date of such acquisitions or purchases. The same is the principle even in the cases where moneys were advanced on mortgages over immoveable properties. The onus is not on the acquirer to prove that the property standing in his name was purchased from joint family funds. That may be so, in the case of a manager of a joint family, but not so in the case of all coparceners. For a greater reason it is not so in the case of female members. [*Paras.* 17, 24.]

It is obligatory on the part of the Court below to undertake the investigation as to the existence of such properties or liabilities and thereafter quantify the rights of parties. In the nature of things in a preliminary decree for partition and allotment of a litigant's share in joint family properties, it is but essential for the trial Court to find out what are all the assets of the joint family, whether moveable or immoveable and after ascertaining such properties, determine the liabilities of the joint family as well and thereafter reckon the litigant's share in the available surplus. It is only in that perspective that a Court can pass a preliminary decree for partition. It cannot avoid its responsibility by postponing the determination of the relevant factors to the final decree proceedings. [*Para.* 10.]

Cases referred to :—

Girimallappa v. *Yeliappagonda*, A.I.R. 1959 S.C. 906 ; *Mallesappa* v. *Mallappa*, (1962) 2 S.C.J. 589 : (1961) 3 S.C.R. 779: A.I.R. 1961 S.C. 1268 ; *M. Gowdappa Hankh* v. *R. Revogowda Sankh*, (1969) 2 S.C.J. 688: (1969) 3 S.C.R. 245; *Narayanaswami* v. *Ramakrishna*, A.I.R. 1965 S.C. 289 : (1965) 1 S.C.J.

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* Appeal No. 465 of 1969 and Memo. of Cross Objections. 11*th October*, 1974.

522 : (1964) 7 S.C.R. 490 ; *Nagayasami* v. *Kochadai*, (1970) 1 M.L.J. 105: A.I.R. 1969 Mad. 329 : *Ramudu Mudaliar* v. *Ellammal*, (1973) 1 M.L.J. 388: A.I.R. 1974 Mad. 51.

Appeal against the decree of the Court of the Subordinate Judge, Chingleput in Original Suit No. 109 of 1963.

T. Rangaswami Iyengar, for Appellant.

N. Sivamani for *Narayanaswami*, for 1st Respondent.

S. Radhakrishnan, for 3rd Respondent.

A. Venkatesan, for Respondent Nos. 5 to 8.

The Judgment of the Court was delivered by

Ramaprasada Rao, J.—Defendants 2, 5, 6 and 7 in O.S.No.109 of 1963 on the file of the Court of the Subordinate Judge, Chingleput, are the appellants. The suit was laid for partition and allotment of plaintiff's one-fourth share in the properties described in schedules B to G in the plaint.

2. The plaintiff's case is as follows: One Devaraja Chettiar had four sons, the plaintiff and defendants 1 to 3. He is said to have carried on a business in coconuts and plantains in Tiruvallur town, with the income from the family properties. The plaintiff has set out in schedule B to the plaint all such joint family properties in which the appellants and respondents 1 to 3 as members of the same, are entitled to a share. It is not disputed that Devaraja Chettiar, by himself inherited certain properties, which became joint family properties, of the plaintiff and respondents 1 to 3 after the demise of Devaraja Chettiar. It is also said that certain properties were bequeathed to plaintiff and respondents 1 to 3 under a Will Exhibit A-1 dated 12th August, 1940, whereby one Masi Ammal, paternal grandmother of the plaintiff bequeathed certain properties of hers to the sons of Devaraja Chettiar. The plaintiff's further case is that defendants 1 and 2, soon after their marriage were living separately for purposes of convenience. Even so, the third defendant was living separately after marriage. The case of the plaintiff is that Devaraja Chettiar provided the first and second defendants with funds and entrusted with them the responsibility of the conduct of the family trade, which the father was running. The plaintiff, who was a minor and was living with his mother, the fourth defendant in the family house is said to have assisted when he became of age, defendants 1 and 2 in the continuance of the family trade. It is also claimed that the first and second defendants were in charge of the management of the joint family properties and in the course of such management, they colluded together and lent moneys on mortgages and promissory notes in the name of second defendant's wife, namely, the fifth defendant and such instruments now standing in the name of the fifth defendant ought to be held to be for the benefit of the joint family, as the consideration thereunder flowed from such surplus income. The plaintiff's case is that schedule B-1 property was also purchased in the name of the fifth defendant from the joint family income and funds. It is said that the second defendant from and out of the joint family funds gifted jewels worth Rs.5,000 to the sixth defendant, who is his concubine. Besides this, the plaintiff claims that jewels of the family worth about Rs.3,000 are with defendants 1 and 2. He would assert that the properties described in schedules C to E.1, are joint family properties and excepting for the debts mentioned in Schedule F, which are to be paid by the family, there were no other debts. A similar assertion is made in the plaint that the properties described in Schedule G are joint family properties in which the plaintiff has an interest and that those properties were acquired with the joint family fund in the name of the seventh defendant, who is the mother-in-law of the second defendant. A positive claim is made that the seventh defendant had no funds of her own to acquire those properties and in this view the plaintiff demands a partition of the properties described in Schedules B to G in the plaint and for an allotment of his separate one-fourth share therein. He had come to Court, since there was no proper response to the suit notice given by him prior to the action.

3. Defendants 1, 2 and 5 filed a common written statement. According to these defendants they never lived as members of the joint family and they had no occasion to enjoy any joint family properties in

common. Their case is that the fourth defendant, who is the mother, is in possession and enjoyment of the B Schedule properties which were bequeathed to her by Devaraja Chettiar under a will and she is also in possession of the properties bequeathed by the paternal grandmother of the plaintiff. Defendants 1 and 2 would say that they have been living separately and carrying on separate business and that the business carried on by them had no connection with the father's trade, which was stopped by him sometime before his death. Out of love and affection, the first defendant used to assist his mother in the management of the properties described in B Schedule. In fact, they had to spend a sum of Rs. 3,000 for installing a pumpset in the B Schedule lands. The specific averment is that the first four items of advances referred to in the C Schedule were made by the seventh defendant from and out of her own funds and that the fifth item in Schedule C never existed at all. These defendants deny that the sixth defendant is the concubine of the second defendant and that he ever gave any jewels worth Rs. 5,000 to her. They would also state that the first two items of the outstandings mentioned in D Schedule do not exist and the third and the fourth items were the separate funds of the second defendant in which the plaintiff cannot claim a share. The sum and substance of the defence is that excepting for the properties mentioned in schedule B, all the other properties are respectively the properties of those in whose favour they were purchased or in whose name moneys were advanced and that the plaintiff cannot claim any interest therein. The sixth defendant denied that she was the concubine of the second defendant and that he has given any jewels to her. The seventh defendant's contention is that the mortgages and sale deeds mentioned in G Schedule were all taken with her own funds and that the second defendant did not contribute any funds for these transactions and that she was otherwise well off, being the wife of a Shroff merchant and the plaintiff, therefore, cannot have any right in the G Schedule properties. The third defendant did not file any written statement and the fourth defendant remained *ex parte*.

4. On the above pleadings, the following issues were framed :

1. Whether the B Schedule properties are available for partition ?

2. Whether the plaintiff and the 4th defendant are liable to account to the defendants 1, 2 and 5 for profits from B schedule ?

3. Whether the business as carried on by the parties is joint family business ?

4. Whether the C and D Schedule outstandings belong to the family ?

5. Whether the items in E.E.1 and F schedule exist ? If so, whether they belong to the family of the parties?

6. Whether the lands in Vadathur are joint family properties?

7. Whether the suit is bad for partial partition ?

8. To what relief, if any is the plaintiff entitled? Additional issues :

1. Whether the properties in G Schedule were purchased *benami* in the name of the seventh defendant by the second defendant?

2. Whether the plaintiff can claim a share in those properties?

Issue 4 was amended as B.1 schedule item had been omitted to be put in issue in the suit and it is as follows :

Whether the C and D schedule outstandings and B-1 schedule item belong to the family.

The learned Judge on issues 1 and 2 under the impression that the plaintiff made a concession at the trial that the B schedule properties are not joint family properties and that they are at present, in the possession of the fourth defendant as mother of plaintiff and defendants 1 to 3 and that those properties will be available for partition only after the lifetime of the fourth defendant between her and her sons, did not deal with these issues at all. On issue No. 3, the learned Judge held that the business carried on by defendants 1 and 2 was a joint family business belonging to the plaintiff and defendants 1 to 3 and that the business carried on by the third defen-

dant also formed part of the joint family property. On issues 4 and additional issues 1 and 2, he held that the moneys advanced in the name of the fifth defendant referred to in C schedule excepting item No. 5 are joint family properties in which the plaintiff has a share. He also held that the C schedule properties are such joint family properties in which the plaintiff has one fourth share. Regarding the property described in schedule B-1, which stood in the name of the seventh defendant, he held that it ought to be brought into the hotchpot for division. As regards the properties described in schedules D, E-1 and F he did not decide whether such outstandings were available for partition, but relegated the investigation to the final decree proceeding. He found, however, that there were no jewels mentioned in plaint E schedule with defendants 1 and 2. On issue 6 he did not give a definite finding, but left it to the parties to seek in appropriate proceedings such remedies as are available to them in law over those properties, which, according to the defendants, are said to be properties, obtained by the mother from and out the income of the B Schedule properties. In the result, a preliminary decree in favour of the plaintiff for partition of his one-fourth share in B-1 Schedule and G Schedule properties was passed. As regards the division of the outstandings and debts, due to the family as stated in D and E 1 Schedules, the learned Judge thought that they could be considered at the time of the passing of the final decree. In other respects, he dismissed the plaintiff's suit, but directed defendants 1 and 2 to pay half costs of the suit and asked others to bear their own costs. It is as against this, the present appeal has been filed.

5. The appellants contend that the lower Court was wrong in having treated the properties standing in the name of the fifth and seventh defendants as properties of the joint family. Their main contention is that the second defendant was having a business of his own and this had no reference to the joint family business at all and in any event it is said that there was no surplus income from the so-called joint family trade carried on by Devaraja Chettiar, and that, therefore, the properties in the name of his wife, the fifth defendant and in the name of his mother-in-law, the seventh defendant, cannot, as a matter of course, be treated as joint family properties.

6. In the above behalf Mr. Rangaswami Aiyangar contends that the properties or the advances made in the name of the fifth defendant and/or the seventh defendant, should be deemed to be properties which are not partible properties, on which the plaintiff could lay hands upon as a sharer therein.

7. The plaintiff has filed cross-objections and it stated that the lower Court was wrong in not having directed a partition of the B Schedule properties, as they are joint family properties, though for purposes of convenience, the mother is managing the same with the assistance of the one or other of the defendants. The other objection is that item 5 of the C schedule ought to have been held as joint family property and that the defendants did not discharge their burden in proving that item No. 5 of C schedule did never exist at all. The legitimate grievance of the cross-objector is that the lower Court having found that the moneys advanced on mortgages in the name of the fifth defendant referred to in C schedule, excepting item No. 5, are joint family funds, the Court ought to have granted a one-fourth share therein to the plaintiff. Again the cross-objector would state that the lower Court went wrong in having relegated to the final decree proceedings the investigation as to the existence or otherwise of the properties described in schedules D, E. I and F to the plaint. A vague contention is raised that the finding that there are no jewels mentioned in E schedule to the plaint is not correct.

8. Before we consider the relative contentions of either parties it is necessary to set out the scope of the contentions either parties. We shall first take up the items of properties described in schedule E to the plaint. In the plaint, a claim is made over moveable properties, such as jewels said to be in the possession of the second defendant and alleged to be joint family properties. The plaintiff, when he was in the box, admits that the

second defendant was living separately, but would add that he was having the joint family trade of Devaraja Chettiar. His case is that though the first and the second defendants were living apart, the goods, which his father used to receive from the suppliers, used to be divided and it was that corpus with which defendants 1 and 2 were trading. He would admit that the third defendant was having a separate business established, but would vaguely add that the second defendant was supplying things to him and, therefore, it was a common business. He does not know when the second defendant or the third defendant started their business. He is not aware of the capital so invested in such business. Excepting for the bare *ipse dixit* of the plaintiff that the jewels mentioned in schedule E are with him and that they have been purchased from the joint family trade, no other evidence was let in to substantiate such a contention. In those circumstances, the learned Judge rightly held that there is no proof that the family even owned the jewels mentioned in plaint E schedule and that the said jewels are either with the first defendant or the second defendant. We accept this finding and hold that there are no jewels mentioned in the E schedule with defendants 1 and 2, which are liable to be partitioned as claimed by the plaintiff.

9. As regards the allegation of the plaintiff that the second defendant made jewels worth about Rs. 5,000 from and out of the family funds and gave them to the alleged concubine of his, namely, the sixth defendant, there is absolutely no proof. The learned counsel for the respondents also is unable to refer to us in the record any acceptable material on which we could hold that the sixth defendant has in her possession jewels worth about Rs. 5,000 which she has to account to the family. We accept the finding in this issue and hold that the sixth defendant is not in possession of any of the joint family properties moveable or immoveable.

10. The next point for consideration is, whether the learned Judge was right in having relegated to the final decree proceedings both the investigation and the determination as to rights of parties over the properties mentioned in schedules, D, E, I and F. Schedule D properties are said to be outstandings in the name of A.D. Kandaswami Chettiar, the second defendant herein. Excepting for a bare enumeration of such debts, the plaintiff has not attempted to establish them. Even so, as regards the properties mentioned in the name of the first defendant, the plaintiff's evidence is, his own self-serving testimony. F schedule relates to the alleged debts due by the joint family. Whether such debts were incurred as stated by the plaintiff and whether they are for the benefit of the joint family are all matters which have to be decided while passing a preliminary decree. The learned Judge was, therefore, not correct in having left open these items for being taken up and adjudicated upon at the time of passing of the final decree. No particular reason has been given as to why the items of properties mentioned in schedules D. E. I and F should be considered only at the time of the passing of the final decree. We are, therefore, constrained to set aside this portion of the judgment of the Court below relating to these three schedules and as we shall presently state it is obligatory on the part of the Court below at the time of the passing of the preliminary decree to undertake the investigation as to the existence of such properties or liabilities and thereafter quantify the rights of parties. In the nature of things in a preliminary decree for partition and allotment of a litigant's share in joint family properties, it is but essential for the trial Court to find out what are all the assets of the joint family, whether moveable or immoveable, and after ascertaining such properties, determine the liabilities of the joint family as well and thereafter reckon the litigant's share in the available surplus. It is only in that perspective that a Court can pass a preliminary decree for partition. It cannot avoid its responsibility by postponing the determination of the relevant factors to the final decree proceedings.

11. We are, therefore, left with the consideration of properties described in schedules B, B-1, C and G.

12. As regards B schedule properties the learned Judge misunderstood the

contentions of parties. It is common ground that the properties described in B schedule are the properties now in the possession of the fourth defendant and, that they are joint family properties. If Devaraja Chettiar made a will of such properties, it is invalid in the eye of law. Exhibit A-1 therefore, cannot be sustained as a will, as it related to joint family properties. Regarding Exhibit B-3, which is also a will left by the paternal grandmother of the plaintiff, the properties which are the subject-matter therein should be deemed and accepted to be properties in which the plaintiff has a defined one-fourth share along with defendants 1 to 3. The fourth defendant, obviously by consent, is enjoying for her life the properties mentioned in schedule B. That would not be a ground to deny the plaintiff's right to obtain a declaration even in this suit as regards his one-fourth share in such properties. It would be idle to postpone the issue of such a declaration in favour of the plaintiff as also concurrently the right of defendants 1 to 3 to get their respective shares in the B schedule properties. The learned counsel for the appellants also does not keenly contest before us that such a concession was made by the learned counsel for the appellant at the trial stage. In the background of such materials placed before us, we find that the plaintiff is entitled to an one-fourth share in the B schedule properties and division of such properties will be effected only after the life-time of the fourth defendant, who has been jointly and by consent held out for a considerable length of time as the person entitled to such income during her lifetime. There will, therefore, be a preliminary decree in favour of the plaintiff declaring his one-fourth right in the B schedule properties. He and defendants 1 to 3 would obtain their separate possession of their one-fourth share only after the lifetime, of the fourth defendant and this shall be borne in mind by the Court which passes the final decree in this partition action.

13. It is convenient for us to deal at this stage with the so-called trade conducted by Devaraja Chettiar and the income which could have arisen therefrom. Besides examining himself, there is no acceptable evidence on the side of the plaintiff to touch upon the nature of the business and its productivity. In the plaint, the plaintiff's allegation is that the father entrusted the first and second defendants with the conduct of the family trade started by him and provided them with funds. His case is that it yielded good income and the family assets were augmented therefrom. He would add that the income from the properties and trade was considerable and it is only from the savings of the income from the land, house and trade, the second defendant purchased properties either in the name of his wife or his mother-in-law. In the written statement, these allegations are specifically denied. They would say that none of the four brothers had any community of interest with the others and that the father did never entrust any family trade to the first and or the second defendant. Whilst admitting that the first and second defendants carried on business, it is alleged that they had no connection with the trade that was carried on by the father, which he stopped sometime before his death. The second defendant denies that he purchased the properties mentioned in B-1 schedule in the name of his wife the fifth defendant, the nucleus being the joint family income.

14. The seventh defendant in her written statement alleges that she had considerable means from which she could advance moneys over mortgages and purchase properties in her own name and that many of the transactions in the G schedule are transactions effected after the institution of the suit and that it is rediculous to suggest that the income from the joint family was the nucleus from which such properties were purchased. When P. W. 1 was in the box, he merely exaggerated the income from the family business. We have already stated while dealing with the B schedule properties, that the income from the joint family properties enumerated in schedule B was enjoyed by the fourth defendant and it is not the fourth defendant's case that she ever contributed or gave any moneys to defendants 1 to 3 for them to utilise the same to augment the joint family properties. As a matter of fact, the com-

mon case of all parties is that the fourth-defendant was enjoying the joint family income and such life-enjoyment of the income of the properties in schedule B was acceded to by all the members of the joint family. From the very nature of things, therefore, it follows that the income from the joint family properties in schedule B could not have formed the nucleus for further augmentation of the joint family properties or for the purpose of advancing moneys on mortgages over immoveable properties in the name of either the co-parceners or their kith and kin. We are unable to lay any reliance upon the evidence of P. W. 1 who does not even know as to the circumstances under which, the first, second or the third defendant started their own business, when he says that there was considerable income from the family business. He admits that his mother was receiving all the rents from the family properties. He would not state in his chief-examination as to what would be the income from the so-called joint family trade. On the other hand, the second defendant, when he was in the box, was searchingly cross-examined. When he stated that he would get a maximum income of Rs. 150 per month in his own coconut business, there was not even a suggestion that the income from the alleged joint family trade could be considerable and that the properties purchased by him in the names of his mother-in-law or his wife or the mortgages taken in the name of his wife or his mother-in-law are to be deemed to be transactions for the benefit of the joint family, as the consideration therefrom should be deemed to have been flown from the joint family income. In cross-examination, the second defendant would say that himself and the third defendant were running shops even during the life-time of their father. Reliance is placed upon Exhibits A-21, A-38, A-39, A-36, A-50 A-51 and A-52 to show that there was a family trade and that the second defendant ought to be deemed, in the circumstances, to have taken over that family trade and continued. Exhibit A-21, is a promissory note for Rs. 100 executed by Devaraja Chettiar and the second defendant, in favour of one Subramania Chettiar. Exhibit A-38, is a mortgage deed executed by Devaraja Chettiar and his sons over certain items of B schedule properties. Exhibit A-39 is again a mortgage executed after the life-time of Devaraja Chettiar by the fourth defendant (the mother) and the son over certain items of B schedule properties. Exhibit A-36 is a promissory note for Rs. 1,000 executed by the first, second and the fourth defendant for the business of the first defendant and the second defendant. Exhibit A-50 is a notice issued by the supplier of the goods to the first and the second defendant, calling upon them to pay all the dues. Exhibit A-51 and A-52 are similar letters. It is significant to note that all these transactions are during 1940 to 1949, when the plaintiff was a minor. The mother, who was examined on the side of the plaintiff, curiously enough supports the plaintiff and says that the income from the lands was put in the business. She miserably fails in the cross-examination, when she confesses that she does not remember as to how much and on what occasion she gave money for the business of her sons. She says that she used to visit the second defendant's shop about seven or eight years ago. She would assert that the sons have a right in the B schedule properties only after her lifetime. She is not aware as to whether the seventh defendant is a well-to-do woman. The trend of evidence of the mother, who was desperately desirous of helping the plaintiff, does not touch upon the real aspect arising in the instant case as to whether the sons carried on any joint family business and whether such a business was productive enough to form the foundation or the substratum for the augmentation of the joint family properties by the first, second or the third defendants. The exhibits referred to above related to the years 1940 to 1949. The account book Exhibit A-20, produced by the second defendant belies that there could have been any joint family business. The most important feature in this case is that the plaintiff did not establish to the hilt that the B schedule properties or the so-called joint family business could ever produce such a large sums of money, which could form the nucleus and the

source for the purchase of properties under Exhibit B-6, or for advancing moneys on mortgages under Exhibits A-6, A-7, B-15 and B-14.

15. It is in this context that the question of law, looms large in this case, namely, whether the burden of proof, which lay heavily on the plaintiff, has been discharged for him to obtain an entitlement so as to demand a share in the properties set out in schedules B-1, C and G to the plaint.

16. Before dealing with it, we shall state the particular facts with reference to the properties claimed by the plaintiff. Exhibit B-6 dated 26th December, 1959, is a registered sale deed of the property in question in favour of the fifth defendant the wife of the second defendant. In the C schedule, there are five items of which the fifth item has been found to be not in existence. We are accepting this finding, as the plaintiff has failed to prove that any amount was due to the family or even to the second defendant as stated in item 5 to the C schedule. The other four items in schedule C are covered by Exhibits A-8, A-4, A-5, A-6 and A-7 respectively. Exhibit A-8 is a mortgage, for Rs. 1,500 in which the fifth defendant is described as the mortgagee and as the person, who advanced moneys thereunder. Similarly Exhibits A-4, A-5, A-6 and A-7 are mortgages in her name. The recitals in the mortgage do support the fifth defendant's case that it was either her money or moneys given to her by her foster-mother, the seventh defendant, that went towards the consideration of all the above mortgages. The G schedule consists of three items. The first two items relate to one property, which was 'purchased by the seventh defendant after the suit was instituted, the consideration for which is said to have flown from her own funds. Even so, under Exhibit B-14 the seventh defendant, long after the filing of the present suit, purchased the house property, which is the subject matter of this exhibit. The seventh defendant's case is that it is ridiculous to say that these properties could have been purchased from and out of the income of the joint family consisting of the plaintiff and defendants 1 to 3 and that the consideration for such purchases was provided for by the second defendant. The learned Subordinate Judge went into the question, whether the seventh defendant could have provided funds to the fifth defendant either for purchasing the B-1 schedule property or for advancing moneys on the four items of mortgages described in the C schedule. He also went into the fact whether the seventh defendant was possessed of funds at all for her to purchase the properties under Exhibits B-15 and B-14. We have already expressed the view that the plaintiff who went into the box, did not even know as to how much income the joint family lands yielded. He is not even aware as to whether from any funds of the joint family, his father or his mother purchased one or the other of the items in schedule B, which are admittedly, joint family properties. He does not know, who pays the kist for the land. He would not produce the so-called account books of the family for the years 1940 to 1956, though he has them in his custody. He would hesitantly say that the rent will be collected by his mother and his brothers. Regarding the schedule G properties, he would say that he was in the library and the Vakil's house is adjoining it and from the library had overheard when the second defendant consulted the Vakil for transferring the sale of the house in the name of the seventh defendant. The mother, examined as P. W. 3, would spin out a case that the income from the land was put in the business and would add that she alone did not enjoy the joint family properties, but she was enjoying the same along with her sons. She would assert that her sons could get a share in the properties only after her lifetime. She would admit that she alone used to collect the rents from the family properties, but would correct herself by saying that her son also would collect the rents. She candidly admits that she sold certain properties and that she did not consult her sons. She would not even remember how much and on what occasion she gave moneys to the shops. She would reiterate that her sons have a right in the joint family properties only after her lifetime. P. W. 4 did not help the plaintiff in any manner. On the other hand, the second defendant, when he went into

the box admitted that the properties in schedule B are enjoyed by his mother and the income from his own properties would be about Rs. 150 per month and that he joined in exhibits A-21, A-38, A-39 and A-36 because his father and his mother as also the creditor wanted him to join in those documents. Lastly, he would say that his wife did not have any property and that the properties or the mortgages standing in the name of his wife were all secured by her from the funds given to her by her foster-mother, the seventh defendant.

17. On a fair reading of the evidence let in by the plaintiff, we are unable to find as to what was the income of the joint family and even if there was any income from the so-called joint family trade, what was the surplus, which was available to enable the co-parceners of the family to augment the same by purchasing properties. The plaintiff has come to Court with a definite case that the properties described in schedule B-1, C and G are joint family properties. He cannot merely plead such a fact without proving them by acceptable material. We are unable to hold that the second defendant was dubbed as the manager of the family. He was an younger member of the family. More reliable evidence is required to impress on the second defendant the badge of a joint family manager. There is not even a whisper either in the pleadings or in the witness box by the plaintiff or his witnesses that the joint family income was handed over to the second defendant for purchase of other properties in the names of the fifth defendant or the seventh defendant. If a co-parcener desires to establish that a property in the name of a female member of the family or in the name of the manager himself has to be accepted and treated as property acquired from the joint family nucleus, it is absolutely essential that such a co-parcener should not only barely plead the same, but also establish the existence of such joint family funds or nucleus. Even if the joint family nucleus is so established, the presumption that the accretions made by the manager or the purchases made by him should be deemed to be from and out of such a nucleus does not arise, if there is no proof that such nucleus of the joint family is not an income-yielding apparatus. The proof required is very strict and the burden is on the person, who sets up a case that the property in the name of a female member of the family or in the name of the manager or any other co-parcener is to be treated as joint family property. Such burden could be said to have been discharged and the usual presumption that such acquisitions are attributable to the joint family nucleus and its income would not automatically arise, but would depend upon proof of the availability of such surplus income or joint family nucleus on the date of such acquisition or purchases. The same is the principle even in cases where moneys were advanced on mortgages over immovable properties. That such a presumption would arise only in the above circumstances, are now very well established.

18. In *M. Girimallappa* v. *R. Yeliappagonda*[1] considering the nature of the presumption, which would arise in the case of new acquisitions made by a manager in his own name, the Supreme Court held :

> " Where the manager of a joint Hindu family acquired certain properties in his own name and there was sufficient nucleus of joint family property out of which those properties might have been acquired and apart from those properties the manager had no other source of income, the presumption arises that the newly acquired properties were the properties of the joint family. Unless that presumption was rebutted, it must prevail."

In *Mallesappa* v. *Mallappa*[2], this principle is reiterated in a slightly different way. The Supreme Court held as follows :

> " Where a manager claims that any immovable property has been acquired by him with his own separate funds and not with the help of the joint family funds of which he was in possession and charge, it is for him to prove by clear

1. A.I.R. 1959 S.C. 906.
2. (1962) 2 M.L.J. (S.C.) 154: (1962) 2 S.C.J. 589: (1961) 3 S.C.R. 779: (1962) 2 An.W.R. (S.C.) 154: A.I.R. 1961 S.C. 1268.

and satisfactory evidence his plea that the purchase-money proceeded from his separate fund. The onus of proof must in such a case be placed on the manager and not on his co-parceners."

We would also refer for completion to a general proposition also laid down by the Supreme Court in *M. Gowdappa Hankh* v. *R. Revgowda Sankh*[1], which is as follows:

"There is no presumption that a Hindu family merely because it is joint, possess any joint property. The burden of proving that any particular property is joint property, is therefore, in the first instance upon the person, who claims it as co-parcenary property. But if the possession of a nucleus of the joint family property is either admitted or proved, any acquisition made by a member of the joint family is presumed to be joint family property. This is, however, subject to the limitation that the joint family property must be such as with its aid the property in question could have been acquired. It is only after the possession of an adequate nucleus is shown, that the onus shifts on to the person who claims the property as self-acquisition to affirmatively make out that the property was acquired without any aid from the family estate."

18. If the above principles laid down by the Supreme Court are borne in mind, there is no evidence in the instant case that the second defendant was manager of the joint family. Therefore, it is not for him to establish that the properties standing in the name of his wife or his mother-in-law, should be deemed to be joint family properties and that he should be deemed to have provided the joint family funds for acquiring the same.

19. Again, the plaintiff did not establish that there was sufficient nucleus of joint family properties, out of which the properties described in schedules B-1, C and G could have been purchased.

20. The plaintiff lastly failed to establish that the joint family properties, the B schedule properties in this case, are such as with its aid the properties in the disputed schedules could have been acquired or moneys could have been advanced on the mortgages referred to herein.

21. We have no hesitation to hold that the Court below wrongly placed the burden on the seventh defendant to establish that she had sufficient funds for her to advance moneys to her foster-daughter, the fifth defendant or for her to purchase properties in her own name. We feel it unnecessary to go into that question, as in law, the onus is not on the seventh defendant to establish that she was possessed of funds. On the other hand, it is for the plaintiff to show that the seventh defendant got the funds from the second defendant and she passed it on to the fifth defendant to acquire the properties mentioned in schedules B-1 and C besides purchasing properties mentioned in the G schedule.

22. Before parting with the case, we have to also consider the nature of proof required, when the property is secured in the names of female members of the family or female relatives. No doubt, the Supreme Court in *Narayanaswami* v. *Ramakrishna*[1], after noticing the fact, that the acquisitions were made in the name of the karta's wife, his son etc., held on a consideration of the evidence that it did not appear that the joint family had *at the date of the acquisitions made* sufficient nucleus from which these properties could be acquired. In that context, the learned Judges said :

"Where in fact at the date of acquisition of a particular property, the joint family had sufficient nucleus for acquiring it, the property in the name of any member of the joint family should be presumed to be acquired from out of family funds and so to form part of the joint family property, unless the contrary is shown."

A division Bench of this Court consisting of Ramamurti, J. and Alagiriswami, J., had occasion to consider the judgment of

1. (1969) 2 S.C.J. 668 at 669 : (1969) 3 S.C.R. 245 : (1969) 1 S.C.C. 386 : A.I.R. 1969 S.C. 1076.

1. (1965) 1 M.L.J. (S.C.) 78 : (1965) 1 An. W.R. (S.C.) 78 : (1965) 1 S.C.J. 522 : (1964) 7 S.C.R. 490 : A.I.R. 1965 S.C. 289.

the Supreme Court in *Narayanaswami* v. *Ramakrishna*[1], in *Nagayasami* v. *Kochadai*[2]. There, our Court said :

"There is no essential distinction as to the scope of the presumption in the case of acquisitions in the names of male members of a joint family and the female members of a joint family. In the case of male members of a joint family, there is a presumption that if the joint family had sufficient ancestral nucleus, the properties standing or acquired in the name of junior members are joint family properties unless the presumption is rebutted by showing that the properties are the separate properties of the particular member or members in whose names the properties stand or were acquired. There is no such presumption in the case of properties standing in the name of female members. In the latter case, it is for the party, who claims properties as joint family properties, to specifically plead the particulars and details, in the pleadings and establish the same by adducing necessary evidence. If there is no pleading and if on the side of the plaintiffs there is no evidence, there is no need for detailed scrutiny of the case of the female members or persons claiming through them, as to the resources of the female members and as to how they acquired the properties in question. If the plaintiff on whom the burden lies adduces no evidence, no further question arises and the female member in whose name the property stands, must be held to be the beneficial owner of the property in question."

23. The learned Judges went elaborately into the question with reference to the established precedents, and said that the Supreme Court did not consider a general situation like the one which arose before them and observed :

"We are not prepared to hold that the Supreme Court intended to overrule the uniform view taken by all the High Courtsin a series of cases and upset this well settled and well established rule of distinction in the matter of presumption."

24. In the light of the above well said and well laid principles of law, we are unable, with great respect, to approve of the decision in *Ramudu Mudaliar* v. *Ellammal*[1]. There, Raghavan, J., observed thus :

"When a family continues to be a joint family, there is no reason why the purchase by a member in a revenue auction should be exclusively for himself and not for and on behalf of the family of which he was a member. It is, of course, open to a member of a joint Hindu family to acquire property in his own name. But the acquirer has to establish that the fund for the purchase did not come from the joint family funds but that it was his own."

With great respect to the learned Judge the onus is not on the acquirer to prove that the property standing in his name was purchased from joint family funds. That may be so, in the case of managee of the joint family, but not so in the case of all coparceners. For a greater reason it is not so in the case of female members. We are, therefore, of the view that, in the absence of any evidence in this case that there was such income yielding apparatus in the nature of a joint family nucleus and in the absence of such joint family properties being available to the co-parceners even for purposes of enjoyment, as in this case the mother is admittedly enjoying the income therefrom, we are unable to hold that the properties described in schedule B-1, C and G ought to be deemed and considered as joint family properties. The properties in the name of the female members and female relatives respectively of the family such as the fifth and the seventh defendants should stand without being disturbed. This is so because the plaintiff has failed to prove that on the date of acquiring these properties, the family had sufficient income from which the disputed accre-

1. (1965) 1 M.L.J. (S.C.) 78 : (1965) 1 An. W.R. (S.C.) 78 : (1965) 1 S.C.J. 522 : (1964) 7 S.C.R. 490 : A.I.R. 1965 S.C. 289.
2. I.L.R. (1969) 1 Mad. 459: (1970) 1 M.L.J. 105 : 81 L.W. 436 : A.I.R. 1969 Mad. 329.

1. (1973) 1 M.L.J. 388 : 86 L.W. 509 : A.I.R. 1974 Mad. 51.

tions or acquisitions might have been made.

25. We shall now take up the memorandum of cross-objections filed by the plaintiff-first respondent. As regards schedule B properties, Mr. Sivamani says that no concession was made in the lower Court about this schedule. But on the other hand it was the common case of all parties that the B Schedule properties are with their mother, the fourth defendant and that she was allowed to enjoy the properties for her life. It does not appear to us that the parties ever agreed, as stated by the learned Subordinate Judge that issue No. 1, need not be considered at all by him. In the light of the events already traversed by us in this judgment and in the wake of the present contentions before us, we have already held that the B schedule properties are to be held as joint family properties and, there will be a preliminary decree for partition and separate possession of the one-fourth share of the plaintiff therein. But at the same time, we make it clear that the plaintiff as well as defendants 1 to 3 could obtain their separate possession of their one-fourth share only after the lifetime of the fourth defendant. The preliminary decree ought to have been passed declaring such rights in the parties and it is only at the time of the passing of the final decree that the above convenient method of separate enjoyment shall be borne in mind by the lower Court.

26. We have already found that item 5 of schedule F does not exist and we do not agree with Mr. Sivamani that there is any substance in the plaintiff's contention that this item should also be deemed to be in existence and forms part of the joint family nucleus. There is no tittle of evidence in this behalf. Even so, we have in the previous paragraphs upheld the contention of the fifth defendant that the assets mentioned in schedule C are her properties and not the properties of the joint family. We have already rendered our reasons for it. There is, therefore, no substance in the cross-objections of the plaintiff in this respect.

27. As regards the outstandings mentioned in schedules D, E-1 and F we have already accepted on principle that the lower Court ought not to have fudged its obligation to investigate on the said items for purposes of finding whether they are available at all and if available whether they are the joint family assets. We have already, in the course of our judgment, indicated that it is for the lower Court to enquire whether the properties mentioned in schedules D, E-1 and F are joint family properties even before it passes a preliminary decree.

28. As regards the E schedule properties we found earlier that no such jewels are in existence and Mr. Sivamani, was unable to place before us any material to find to the contrary.

29. In the result, therefore we allow the appeal with costs and allow cross-objections in part, but each party will bear their own costs in the cross-objections.

30. We, however, set aside the direction of the lower Court against defendants 1 and 2 to pay one half of the costs of the suit to the plaintiff, as before us, defendants 1 and 2 have substantially succeeded in almost all their contentions. The plaintiff, the cross-objector in the memorandum of cross-objections, shall bear the Court-fees payable by himself throughout, if they had not already paid the same.

31. In the light of our findings that the lower Court did not fully investigate into the assets of the joint family with particular reference to properties described in schedules D, D-1 and F and for the reason that we have allowed the present appeal, the preliminary decree rendered by the Court below has to be recast and hence the subject-matter is remitted to it for further investigation. The lower Court shall, on remit, after hearing the parties, and in the light of this judgment, pass a fresh preliminary decree setting out the entitlements of the plaintiff and defendants 1 to 3 in the joint family properties.

R. S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*G. Ramanujam, J.*

Anjalai .. *Petitioner**

v.

The Authorised Officer (Land Reforms), Mayuram, Thanjavur District and others .. *Respondents.*

Tamil Nadu Land Reforms (Disposal of Surplus Land) Rules (1965), *rule* 7—*Rule prescribing time limit—Assignment of land—Application for—Whether* ultra vires *section* 94 *of the Madras Land Reforms (Fixation of Ceiling on Land) Act*, 1961.

The rule requiring an application for assignment to be filed within a particular time cannot be said to be *ultra vires* section 94 of the Madras Land Reforms (Fixation of Ceiling on Land) Act, 1961. There is no inconsistency between the rules and the provisions in section 94.

[*Paras.* 7 *and* 8.]

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* and *mandamus* calling for the records relating to the proceedings from the Land Commissioner, Board of Revenue (Land Reforms), Chepauk, Madras in Board's L. Dis. No. F-3 2739 of 1975 (L. Ref.) dated 28th January, 1975 confirming the order of the District Revenue Officer, Thanjavur dated 5th November, 1974 in his proceedings No. 23925/74/J/10 and that of the Authorised Officer (Land Reforms), Mayuram, dated 28th November, 1973 and made in MR IV/ii/17-70/A-9 and quash the order therein in so far as the petitioner is concerned with costs of the petitioner and direct the first respondent herein to assign to the petitioner the lands situated in Nemmeli village, Sirkali taluk in R.S. No. 9/2 which were declared surplus and belonged to K. Arunachala Iyer.

K.V. Sankaran, for *R. Ganesan*, for Petitioner.

* W. P. No. 1714 of 1975.

17th March, 1975.

The Court made the following

ORDER.—The petitioner claims to be a cultivating tenant in respect of 51 cents in R. S. No. 9/2 belonging to one Arunachala Iyer of Nemmeli village in Sirkali taluk. An extent of 3.64 acres of wet lands belonging to the said Arunachala Iyer was declared as surplus land by the Authorised Officer, the first respondent herein, under the Madras Land Reforms (Fixation of Ceiling on Land) Act, 1961, hereinafter referred to as the Act. R.S. No. 9/2 formed part of the land declared as surplus. In the draft and final notification published under sections 12 and 18 respectively the name of the petitioner had been shown as occupier. After the final notification under section 18, excess lands were taken over by Government. Thereafter a notice in form B inviting applications in Form C for assignment of the lands was duly published. Two applications had been received in answer to the said notice for the assignment of the above lands. The said applications were duly notified in Form D and objections were called for. The Special Deputy Tahsildar Mayuram was asked to conduct an enquiry on the C form applications. After purusing the records of the enquiry and the recommendations of the said Special Deputy Tahsildar, an assignment was ordered on 28th November, 1973 in favour of the fourth respondent in respect of an extent of 3 acres 64 cents and in favour of the Chandrasekaran in relation to 20 cents.

2. The petitioner who claims to have been dispossessed as a result of the final notification under section 18 filed an application for assignment on 21st January, 1974 that is, long after the assignment had been made. This application was returned by the Authorised Officer on 31st January, 1974 stating that an order of assignment had been passed on 28th November, 1973 and that the petitioner may prefer an appeal before the District Revenue Officer if she is so advised. The petitioner thereupon filed an appeal before the District Revenue Officer against the order of assignment passed by the Authorised Officer on 28th November, 1973 assigning parts of the lands in favour of the fourth respondent. It was contended by the petitioner before the District Revenue Offi-

cer, the second respondent herein, that she being a tenant referred to in the draft and final notification under sections 12 and 18 respectively is entitled to priority over all other claimants for assignment that she has always been willing and ready to make the application for assignment, that the fourth respondent has no right to get the assignment of the lands in preference to the petitioner, and that in any event, the dispossession of the petitioner from the lands in her occupation will cause irreparable loss and hardship and that therefore the order of assignment passed on 28th November, 1973 should be set aside. On behalf of the fourth respondent it was contended before the second respondent that the petitioner not having applied for assignment of the lands in question, nor having filed any objections to the proposed assignment as required under the rules she is not entitled to challenge the assignment.

3. The second respondent found that the petitioner was a tenant in occupation of a portion of the excess land and that her name finds a place in the draft and final notifications under sections 12 and 18 respectively. He also found that the publication of D form notice inviting applications had been duly made, that notice in Form D calling for objections was also duly notified, and that the petitioner did not either file an application for assignment before the notified date before 28th November, 1973 when the final orders of assignment were passed nor did she file any objection to the assignment in favour of the fourth respondent. Ultimately the second respondent held that:

> "The appellants did not choose to apply for assignment in time though they were made aware of the publication of B Form notice. They could have at least objected to the proceedings during the interval of about four months from the last date fixed for the receipt of objections and the date of Authorised Officer's passing orders. In this also, they have failed. As such their contention that they have been waiting to file their applications cannot be accepted. In the absence of applications from the appellants, the Authorised Officer (L.Ref.), Mayuram is right in having assigned the lands to the only appellant-the respondent."

4. Against the order of the second respondent refusing to interfere with the order of assignment dated 28th November, 1973 passed by the Authorised Officer, the petitioner herein filed a revision before the Land Commissioner, the third respondent herein. In the said revision the petitioner had urged that her tenancy having been notified in the draft and final statements under sections 12 and 18 respectively she is entitled to preferential treatment in the matter of assignment and that the Authorised Officer had erred in not taking into consideration her claim for assignment of the said land. The third repondent also found that the petitioner had not applied to the Authorised Officer in Form C for assignment of the lands as required under rule 7 of the Tamil Nadu Land Reforms (Disposal of Surplus Land) Rules, 1965, that the said rules did not enable the Authorised Officer to assign the land *suo motu* in favour of a person who has not applied for assignment in the form and within the "prescribed time," and, therefore, the petitioner's claim for assignment made long after the orders of assignment had been passed had rightly been rejected.

5. In this writ petition the learned counsel for the petitioner contends that it is not open to the rule-making authority to frame a rule fixing a time limit for filing application for assignment, that the petitioner being a tenant whose name has been notified in the draft and the final notification under sections 12 and 18 respectively she should automatically be granted an assignment, whether she filed an application or not.

6. I am not inclined to agree with the above contention. Even though the petitioner is a notified tenant in occupation of a portion of the excess lands entitled to a preferential claim for assignment as per rule 5 of the Tamil Nadu Land Reforms (Disposal of Surplus Land) Rules, 1965 she is also bound to make an application for assignment of the surplus land to the Authorised Officer in Form C under rule 7 of the said rules which has to be naturally considered by the Authorised Officer by following the procedure set out in rule 8. Admittedly the petitioner in this case has

not made any application before the last date for sending the applications or before 28th November, 1973 when the order of assignment was made. I cannot agree with the learned counsel for the petitioner that even though an order of assignment has been made, once the petitioner files an application though belatedly, she having a preferential claim, the earlier order of assignment should have been cancelled and the petitioner's application should have been considered and assignment ordered. There is also no force in the contention of the learned counsel for the petitioner that there is no time limit for filing an application, that an application for assignment can be filed at any time and that the statute itself does not contemplate an application for assignment being filed within a particular time. Once the surplus lands vest in the Government the lands have to be disposed of under section 94 of the Act.

7. Section 94 enables the Government, after taking into consideration the object specified in the Preamble to the Act, to make rules providing for the manner in which any land acquired by the Government under the Act shall be disposed of and the rules so framed will come into force after the approval of the Legislature. Sub-section 2 of section 94 provides that in the disposal of the land acquired by the Government under the Act they shall give preference to any person who is completely dispossessed of his holding or whose extent of holding is reduced to below three standard acres held by him partly as cultivating tenant and partly as owner or wholly as cultivating tenant. The learned counsel may be right in his submission that under section 94 (2) the petitioner as a person dispossessed of his holding as a tenant is entitled to preference, and that one of the objects specified in the Preamble to the Act is to see to the distribution of the land acquired by the Government under the provisions of the Act to the landless and other persons among the rural population and that the rules framed for the disposal of the lands should be consistent with the said objects specified in the Preamble and section 94 (2) providing for a preferential treatment to the tenants dispossessed of their holding. The rule requiring an application for assignment to be filed within a particular time however, cannot be said to be *ultra vires* section 94 as contended for by the learned counsel for the petitioner. Section 94 enables the Government to make rules providing for the manner in which lands are to be disposed of. It is true in making those rules the Government has to bear in mind the preferential treatment given to the persons dispossessed. The Tamil Nadu Land Reforms (Disposal of Surplus Land) Rules, 1965 have been framed by virtue of the power contained in section 94 and the preferential treatment given to persons dispossessed under section 94 (2) is specifically provided in rule 5 of the said Rules. The rules of preference contained in section 94 (2) as also rule 5 of the said rules contemplate more than one application. Naturally therefore the Authorised Officers should be empowered to call for applications for assignment of lands from all eligible persons and it is for this purpose he publishes a notice in Form B inviting applications for assignment of surplus lands before a particular date. Thereafter all the applications received are notified in form D and objections if any to the assignment of the land to the applicants had to be filed on or before a certain date. Thereafter the Authorised Officer considers all the applications and makes an assignment of the land in the light of rule 5.

8. The learned counsel point out that though the provisions of the Act or the rules do not provide for any time limit in filing applications, time limit is notified in form B for filing applications and this is contrary to the provisions of the Act and the Rules. I am not inclined to treat the date mentioned in form B notice as fixing a period of limitation for filing applications. The Authorised Officer has to find-out who are all the persons willing to take or are eligible for assignment under the rules. For that purpose he has to call for applications to be filed on or before a certain date as otherwise he has to wait indefinitely. If the petitioner has applied at least before the Authorised Officer finally considered the applications for assignment, it is open to him to contend that though his application is beyond the time mentioned in the notice in Form B, it should have been considered at the time of the actual assignment. Admitted-

ly in this case there was considerable interval between the date mentioned in the notice in Form B and 28th November, 1973, the actual date of assignment, and even during this interval the petitioner has not filed any application for assignment. It is not, therefore, possible for me to accept the petitioner's contention that as a person dispossessed she is entitled to an order of assignment without filing any application for assignment, or that she can file an application at any time even after the assignment. I do not see any inconsistency between the rules and the provisions in section 94. Even though the petitioner is entitled to a preferential claim for assignment still she has to comply with the requirement as to an application for assignment before the question of assignment comes up for consideration. The petitioner also contends that the fourth respondent to whom the lands have been assigned is not an eligible person in that he is not likely to engage himself in direct cultivation. But this point has not been urged before any of the authorities below. It is only in the affidavit in support of the writ petition it has been stated in a very casual manner that the fourth respondent is a retired teacher receiving pension, that he is living in a different village and that he is not a person who is likely to engage himself in direct cultivation. But the question whether the fourth respondent is a person who is likely to engage himself in direct cultivation is one of fact and such a factual question should have been agitated before the authorities below. The petitioner cannot agitate such a factual question in writ proceedings. In this case the application for assignment was filed long after the assignment order had been passed by the Authorised Officer. I do not therefore see any error in the order impugned. The writ petition, therefore, fails and it is dismissed.

S.J. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*G. Ramanujam* and *V. Ramaswami, JJ.*

Lakshmi Ammal .. *Appellant**

v.

Meenakshi Ammal and others .. *Respondents.*

(A) *Hindu Law—Joint Family—Business in the name of a member—No presumption of being joint family business.*

(B) *Adoption—Motive—Secular or religious—Relevance—Property obtained from natural family subsequent to adoption—Nature of interest taken by adoptee.*

There is no presumption in Hindu Law that a business standing in the name of a member of a Hindu joint family is a joint family business even when that member is the manager or the father, and that unless it could be shown that the business in the hands of the coparcener grew up with assistance of the joint family, or the joint family funds, the business remains separate. [*Para.* 8.]

Adoption of a son is very often, especially in certain communities, resorted to more with secular motives. It need not always be so. The religious considerations are so strong and could outweigh any mercenary interest in such cases. [*Para.* 11.]

On adoption the person to whom he is adopted becomes the adoptive father and only properties inherited from him thereafter could be called ancestral properties and any property got by him from his natural family will be in the nature of a gift from the natural family and not ancestral in his hands.

It seems to be strange that a property inherited by him before adoption should continue in his hands even after adoption as ancestral property but if he had got the same property from his natural father after the adoption it could not be con-

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*Appeal No. 19 of 1968. *25th March,* 1974.

sidered to be ancestral property. But law does not always run on logical lines. [*Para.* 14.]

Cases referred to :—

G. Narayana Raju v. *Chamaraju*, (1968) 2 S.C.J. 749: (1968) 3 S.C.R. 464: A.I.R. 1968 S.C. 1276; *Mahableshwar Narayan* v. *Subramanya Shivram*, 25 Bom.L.R. 274: I.L.R. (1923) 47 Bom. 542: 72 I.C. 309: A.I.R. 1923 Bom. 297; *Bahinbai* v. *Kisanlal*, A.I.R. 1950 Bom. 47; *Shyama Charan* v. *Sricharan*, A.I.R. 1929 Cal. 337; *Sri Rajah Venkatanarasimha Appa Row* v. *Sri Rajah Rangayya Appa Row*, (1906) 46 M.L.J. 178: (1906) I.L.R. 29 Mad. 437; *Krishnarao Kango* v. *Naraya Devji Kango*, 1954 S.C.J. 408: (1955) 1 S.C.R. 1: (1954) 1 M.L.J. 630: A.I.R. 1954 S.C. 379; *Sandanam Pillai* v. *Somasundara Chettiar*, (1937) 1 M.L.J. 364: A.I.R. 1937 Mad. 436; *Narayanaswami Mudaliar* v. *Ratna sabapathy Mudaliar*, (1937) 2 M.L.J. 906: A.I.R. 1938 Mad. 136.

Appeal against the decree of the Court of the Subordinate Judge of Mayuram, dated 24th December, 1966 and passed in Original Suit No. 21 of 1963.

T.R. Ramachandran and *T.R. Rajagopalan*, for Appellant.

V. Sridevan and *G.G. Modak*, for Respondents.

The Judgment of the Court was delivered by

Ramaswami, J.—One Panju Sastrigal of Pavattakudi village, Nannilam Taluk had two sons by name Ramaswami and Sambamoorthy, the 1st plaintiff herein. Sambamoorthy was adopted by one Ananthanarayana Iyer in or about the year 1890. Subsequent to the adoption, Sambamoorthy was married to one Ponnammal. Sambamoorthy had a son Halasyam and daughter Laxmi, the 2nd plaintiff in the suit. Halasyam died on 3rd July, 1961 and the 1st defendant is his widow. Defendants 2 to 5 in the suit are the tenants in possession of the suit properties. Pending the suit the 1st plaintiff Sambamoorthy died on 13th July, 1962 and his daughter, the 2nd plaintiff was brought or record as his legal representative.

2. The plaint A Schedule properties are pannai lands of an extent of 5 acres 24 1/3 cents. Schedules B to B-3 are lands under tenancy with defendants 2 to 5 and measure an extent of 7 acres 58 2/3 cents. The B schedule are two houses in Pavattakudi village and the C schedule relates to movables and cattle. The A schedule pannai lands were in possession and cultivation of the 1st plaintiff's son Halasyam till his death on 3rd July, 1961 and thereafter continued to be in possession and cultivation of the 1st defendant. The D schedule houses are also in possession of the 1st defendant. After the adoption sometime between 1896 and 1902 Sambamoorthy left the village for Madras. He was doing sweet-meat sales business originally as an assistant, then as a partner with one Subramania Iyer and later he purchased the partnership business itself and became its sole proprietor. Out of the earnings from this business the 1st plaintiff purchased the suit properties and a number of other items of properties; some items had been disposed of by him and an extent of 4 acres 28 cents of nanja land apart from the suit properties were also stated to be in the possession of the 1st plaintiff through his tenants. He had also purchased a house in Mayavaram which was in his occupation till his death. After his death the 2nd plaintiff got into possession of these 4 acres 28 cents and the house in Mayavaram.

3. It is the case of Sambamoorthy that the suit properties and others are his self-acquired properties, that he did not get any immovable properties or cash or any other property either from his natural father or his adoptive father or from anybody else, that he saved substantially when he was assisting in various sweet-meat stalls and that with that money he became a partner with Subramania Iyer. With the earnings from that business he was able to purchase the other partner's share and became the sole proprietor of the business. All the suit properties were acquired out of the income from this sweet-meat business during the period between 1910 and 1925 when the 1st plaintiff's son Halasyam was just a minor he having been born only in 1910. By h's last will and testament dated 27th August, 1961, Sambamoorthy had bequeathed all

his properties to his daughter, the 2nd plaintiff, after the death of his son Halasyam. On these allegations he had filed the suit for possession of the suit immovable and movable properties and for mesne profits.

4. In the written statement filed by the 1st defendant she contended that the adoptive father had considerable immovable properties and cash and the adoption itself was made with a view to secure these properties. There were also ancestral properties belonging to the natural father in which Sambamoorthy was also given a share.

5. The 1st plaintiff while young invested his ancestral funds and became a partner in a sweet-meat shop run at Madras and a little later purchased the other share in the partnership also with the ancestral funds. With the income from the the business the suit properties were purchased and the plaint schedule properties and the house in Mayavaram and the 4 acres 28 cents which are in possession of the 2nd plaintiff are all joint family properties in which Halasyam, the husband of the 1st defendant had an equal share. She further pleaded that the plaint schedule properties were allotted to Halasyam even during his lifetime at a tentative partition and division and it is only in pursuance of that partition Halasyam was put in possession of the plaint schedule properties. She further pleaded that the will alleged to have been executed by the 1st plaintiff was neither true nor valid in law, that it was executed under undue influence and coercion of the 2nd plaintiff and her husband. In fine she asked for a decree for partition of the plaint schedule and other properties set out in the written statement if it were to be found that the tentative partition is not acceptable.

6. Though the learned Subordinate Judge found that Sambamoorthy did not inherit any properties from his adoptive father and the properties which he got from his natural father and mother cannot be considered to be ancestral property in his hands, for reasons which are not clear, he gave a finding that the suit properties are the joint family properties of Sambamoorthy and his son Halasyam. On the question of tentative partition he found against the defendants. He also found that though the will was true it was invalid and inoperative so far as the share of Halasyam was concerned and that the 2nd plaintiff could derive title only in respect of a half share in the suit properties. In the result, he held that the 2nd plaintiff was not entitled for recovery of possession of the entire suit properties but that she was entitled for partition and separate possession of the half share of the 1st plaintiff. Mesne profits were directed to be decided in the final decree proceedings. The plaintiff has preferred this appeal.

7. The first question that arises for consideration in this appeal is whether the sweet-meat business was founded by Sambamoorthy with the ancestral or joint family funds so as to make the acquisition of the properties out of the profits from that business as joint family properties.

8. It is now well-settled that there is no presumption in Hindu Law that a business standing in the name of a member of a Hindu family is joint family business even when that member is the manager or the father, and that unless it could be shown that the business in the hands of the coparcener grew up with the assistance of the joint family or the joint family funds the business remains separate—*Vide G. Narayana Raju* v. *Chamaraju*[1].

9. It is the case of the appellant that Sambamoorthy did not get any properties of the natural family and that his adoptive father also had no properties; it is only with the small savings he made when he was serving as assistant in various sweet-meat shops that he had established the business and that therefore the business was not a joint family business. There was a dispute as to whether the adoption of Sambamoorthy was in the year 1890 or subsequent to 1896. This point would be considered at a later stage in this judgment.

10. It is in the evidence of D.Ws. 1 and 3 that sometime prior to 1886 Ananthanarayana Iyer, the adoptive father was owning 15 mahs of land in the village Pavattakudi. Out of that he sold on 8th

1. (1968) 2 S.C.J. 749: (1968) 3 S.C.R. 464: A.I.R. 1968 S.C. 1276.

August, 1886 under Exhibit A-84 10 mahs and 50 kullis of land. By another document Exhibit B-5 dated 11th June, 1889 he sold an extent of 8 mahs and 40 Kullis to Sambamoorthy himself, who was then not adopted by him. The total extent thus sold under Exhibits A-84 and B-5 exceeds 18 mahs, while the evidence of the defendants was that he was owning only 15 mahs of land. It might be that subsequent to Exhibit A-84 and before Exhibit B-5 Sambamoorthy had acquired certain lands. We have no evidence to show that apart from the properties dealt with in these two documents Ananthanarayana Iyer was in possession of any other properties.

11. The learned counsel for the respondents contended that if Ananthanarayana Iyer did not have any properties at the time of adoption it is improbable that he would have adopted Sambamoorthy or that the natural father would have agreed to give him in adoption especially when there is evidence to show that the natural family had certain ancestral properties of its own. It is true that very often especially in certain communities adoption is resorted to more with secular motives. It need not always be so. The religious considerations are so strong and it could outweigh any mercenary interest in such cases. Further we have the evidence in this case that in spite of the adoption Sambamoorthy was given a half share in the properties of the natural family and the other half being allotted to his natural brother. Therefore, in the the absence of any evidence to show that the adoptive father had any property movable or immovable at the time of adoption we cannot assume that he had any properties. As already stated, there is no evidence to show that the adoptive father was having any other property than those which he had disposed of under Exhibits A-84 and B-5. We therefore confirm the finding of the Court below that Sambamoorthy did not get any property from the adoptive family.

12. It is seen from Exhibit B-4 dated 20th May, 1896 which is a lease deed executed by Ramaswami, Sambamoorthy and their mother Krishnammal that the natural family was atleast in possession of 6 acres and 7 cents of land on that date. The rent payable under that document was 90 kalams of paddy. Ramaswami and Sambamoorthy had also advanced a sum of Rs. 1,000 on a mortgage under Exhibit B-6 dated 2nd January, 1902. On 16th June, 1902 Sambamoorthy and Ramaswami executed two documents—one of them Exhibit A-4 by which Ramaswami assigned his half share in the mortgage right in favour of Sambamoorthy and under the other document (Exhibit B-7) Sambamoorthy assigned his half share in immovable properties measuring 6 acres 7 cents above referred to in favour of Ramaswami. Thus Sambamoorthy became entitled to the entire mortgage sum of Rs. 1,000 due under Exhibit B-6 mortgage and Ramaswami became full owner of the immovable properties. The question for consideration is whether the sum of Rs. 1,000 due under the mortgage bond is ancestral property in the hands of Sambamoorthy. It is the contention of the learned counsel for the appellant that after the adoption the adopted son loses all his rights in the natural family and becomes a member of the adoptive family, and that any property inherited or obtained from the natural family would not be ancestral property in his hands because it is not property got from his father. On the other hand, the learned counsel for the respondents submitted that the recitals in Exhibit B-7 show that what he conveyed under that document to his brother Ramaswami was his share in the properties of the natural family and that when once he got the property as per his share in the natural family whether the inheritance was prior or subsequent to the adoption the property is ancestral in his hands. In support of this contention the learned counsel for the respondents relied on certain decisions which may now be noticed.

13. In *Mahableshwar Narayan* v. *Subramanya Shivram*[1], it was held that a share coming to a Hindu on partition belongs absolutely to him and on his being adopted such a share does not become divested. This decision was followed in *Bahinbai* v. *Kisanlal*[2], To the same effect

1. 72 I.C. 309 : 25 Bom.L.R. 274 : I.L.R. 47 Bom. 542 : A.I.R. 1923 Bom. 297.
2. A.I.R. 1950 Bom. 47.

is the decision in *Shyama Charan* v. *Sricharan*[1].

14. But it should be seen that even in the case of the sole surviving coparcener it was held by this Court in *Sri Rajah Venkatanarasimha Appa Row* v. *Sri Rajah Rangayya Appa Row and others*[2], that an adoption into another family of the only surviving member of a joint family in whom the family estate has vested solely and absolutely does not in law operate to divest him of all his rights in such estate. All these cases related to acquisition of properties of the joint family prior to the adoption but having regard to the fact that by an adoption into some other family the adopted person completely loses all his rights in the natural family, any property which he gets from his natural family subsequent to the adoption could not be treated to be the ancestral property in his hands. On adoption the person to whom he is adopted becomes the adoptive father and only properties inherited from him thereafter could be called ancestral properties and any property got by him from his natural family will be in the nature of a gift from his natural family and not ancestral in his hands. It seems to be strange that a property inherited by him before adoption should continue in his hands even after adoption as ancestral property but if he had got the same property from his natural father after the adoption it could not be considered to be ancestral property. But law does not always run on logical lines. The question therefore arises as to when the adoption took place and whether Sambamoorthy was given a share in the natural family before adoption or after adoption. It is seen from Exhibits B-4 and B-6 that the adoption could not have been before 1896 and it was some time between 1896 and 1902. In Exhibits B-5 dated 20th May, 1896 which is a lease deed executed by Ramaswami, Sambamoorthy and their mother Krishnammal, Sambamoorthy is described as the son of Panju Sastrigal and not as adopted son of Ananthanarayana Iyer. It is only in Exhibit B-6 of the year 1902 we find that he is described as the adopted son of Ananthanarayana Iyer. It could therefore fairly be inferred that the adoption was sometime after Exhibit B-4 dated 20th May, 1896. Even by the time of Exhibit B-4 the father of Sambamoorthy was dead and both Ramaswami and Sambamoorthy were described as the owners of the property. While conveying his share under Exhibit B-7, dated 16th June, 1902 Sambamoorthy described his right in the property as his half share and specific portion is described in the document as the property belonging to the assignor with specific boundaries. One of the boundaries is recited as the share belonging to the assignee. We could therefore safely infer that he had already obtained a specific portion even prior to his adoption. Since the mortgage right in the sum of Rs. 1,000 was given in consideration of his assigning a share in the immovable properties that amount would be considered to be ancestral property. But mere existence of ancestral property is also not enough to conclude that the business carried on by Sambamoorthy was joint family business. There must be proof that the ancestral property was sufficient and productive enough and the income from the property was utilised for the purposes of the business—vide *Krishnarao Kango* v. *Narayn Devji Kango*[1]. *Sandanam Pillai* v. *Somasundara Chettiar*[2] and *Narayanswami Mudaliar* v. *Ratnasabapathy Mudaliar*[3].

15. We have the evidence in this case that even prior to 16th June, 1902, the date on which the assignment of the mortgage was executed in favour of Sambamoorthy, the said Sambamoorthy had left for Madras and was doing business. The assignee Sambamoorthy in described in this document as living in Madras and as having come down to the village from Madras for the purpose of having the assignment. The evidence in this case show that the mortgage was discharged

1. A.I.R. 1929 Cal. 337.
2. (1906) 16 M.L.J. 178 : (1906) I.L.R. 29 Mad. 437.

1. 1954 S.C.J. 408 : (1955) 1 S.C.R. 1 : (1954) 1 M.L.J. 630 : A.I.R. 1954 S.C. 379.
2. (1937) 1 M.L.J. 364 : A.I.R. 1937 Mad. 436.
3. (1937) 11 M.L.J. 906 : A.I.R. 1938 Mad. 136.

only sometime in the year 1907. Even by that time Sambamoorthy had become a partner in the business with one Subramania Iyer. Therefore no part of the income could have been utilised for the purposes of the business. We therefore hold that the sweet-meat business conducted by Sambamoorthy was not joint family property.

16. As already stated there is no dispute that the suit properties were acquired only from and out of the income from the sweet-meat business. It follows that the properties were the self acquired properties of Sambamoorthy and the disposition by will in favour of the 2nd plaintiff is valid. In view of this finding, no other point arises for consideration.

17. In the result, this appeal is allowed, the judgment and decree of the Court below are set aside and the suit is decreed as prayed for. But having regard to the relationship of the parties and the circumstances of this case there will be no order as to costs.

R.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Ramaswami, J.*

Y. Abdul Mallik and another .. *Appellants**

v.

St. Francis Xavier's Church, Represented by its parish Priest Fr. Joseph Sandanam .. *Respondent.*

Madras City Tenants Protection Act (XIX of 1955), section 2 (4)—Suit for recovery of possession—Assignee from tenant—Whether protected—Superstructure assigned—Original tenant not entitled for compensation for superstructure.

Though an assignee is now given protection under the Madras City Tenants Protection Act, it is not all assignees that will get the protection, but only those assignees of lands and buildings who get the assignment prior to 12th September, 1955 and continued in possession thereafter; they alone will be entitled to the benefit of the protection under the amended definition of the term 'tenant'. [*Para.* 5.]

In cases where the original tenant had assigned the lease-hold rights and the superstructure put up by him, he will not be entitled to compensation for the superstructure as such. [*Para.* 6.]

Cases referred to:—

Sundareswarar Devasthanam v. *Marimuthu*, I.L.R. (1963) Mad. 1054: 76 L.W. 381: A.I.R. 1963 Mad. 369; *Kuppa Bai* v. *Rajagopal Nadar*, (1969) 2 M.L.J. 541; *Haridas Giridharidas* v. *Varadaraja Pillai*, (1973) 2 S.C.J. 484: (1973) 2 M.L.J. (S.C.) 45: (1973) 2 An.W.R. (S.C.) 45: (1972) 1 S.C.R. 291: (1971) 2 S.C.C. 601: (1971) R.C.J. 959: A.I.R. 1971 S.C. 2366.

Appeal against the Decree of the Court of the Ist Additional City Civil Judge, Madras in Appeal Suit No. 136 of 1970, preferred against the decree of the Court of the First Assistant City Civil Judge of Madras in Original Suit No. 3546 of 1966.

P.V. Subramaniam, for Appellants.

S.K. Ahmed Meeran and *Abdul Hadi*, for Respondent.

The Court delivered the following

JUDGMENT.—The suit, out of which this second appeal arises, was filed by the respondent for recovery of possession of the suit property. The first defendant was the tenant of the plaintiff in respect of the vacant site. The lease was long prior to 1955, the monthly rent being Rs. 20. The first defendant put up a superstructure also prior to 1955 on the site as a tenant. On 15th July, 1965 the first defendant assigned both the leasehold right and the superstructure in favour of the second defendant. The plaintiff determined the tenancy by notice dated 2nd May, 1966 and called upon the first defendant to deliver vacant possession. In the notice, the plaintiff had offered compensation of Rs. 300 to the first defendant for the superstructure put up by him. It was also claimed by the plaintiff that the site which was leased out to the first defen-

*S.A. No. 1173 of 1972. *21st March, 1975.*

dant was part of the plaintiff Church and that therefore, the first defendant has no right of purchase of the land itself. In reply to this notice, the first defendant stated that he sold the superstructure to the second defendant and that the second defendant would pay the future rent to the plaintiff. The plaintiff sent a further notice to the effect that the first defendant had no right to assign and that the sale was not binding on the plaintiff. Thereafter, the suit was filed for recovery of vacant possession against both tenant and his assignee, the second defendant. The second defendant filed a written statement in which he claimed that, by virtue of the assignment of the leasehold right and the superstructure, he became a tenant entitled to the protection under the City Tenants Protection Act. He further contended that no notice was issued to him as required by section 11 of that Act and that therefore, the suit was not maintainable. He also contended that the plaintiff Church could not be represented by the Parish Priest and the suit was not properly instituted. The second defendant also filed an application under section 9 of the Act for purchase of the land. The written statement filed by the second defendant was adopted by the first defendant by filing a memo.

2. Both the Courts below have now held that the suit site is part of the Church itself and that therefore, the application under section 9 is not maintainable in view of the decisions of this Court of which one is *Sundareswarar Devasthanm* v. *Marimuthu*[1]. The Courts below have also held that an assignee of a tenancy-right with the superstructure is not entitled to the protection of the City Tenants Protection Act as he will not be a tenant under the Act. In support of this contention, they relied on the decision of this Court in *Kuppa Bai* v. *Rajagopal Nadar*[2]. When the second appeal was pending the Legislature amended the definition of "tenant" in section 2 (4) by Tamil Nadu Act XXIV of 1973." The learned counsel for the appellants relied on this amended definition and contended that the second defendant had now become a tenant even if there was any doubt as to whether he was a tenant prior to the amendment of the definition. The first question, therefore, that arises for consideration is whether the assignee of a superstructure and the leasehold right could claim the benefit of the City Tenants Protection Act as a tenant. The definition of the word "tenant" as it stood originally, ran as follows :

> " 'Tenant' means tenant of land liable to pay rent on it, and every other person deriving title from him, and includes persons who continue in possession after the termination of the tenancy."

This definition was substituted by Tamil Nadu Act XIII of 1960, which came into force on 27th July, 1960 and the amended definition ran as follows :

> " 'Tenant' in relation to any land :
>
> (i) means a person liable to payment in respect of such land, under a tenancy agreement express or implied, and
>
> (ii) includes :
>
> (*a*) any such person as is referred to in sub-clause (1) who continues in possession of the land after the determination of the tenancy agreement, and
>
> (*b*) the heirs of any such person as is referred to in sub-clause (i) or sub-clause (ii) (*a*) ; but does not include a sub-tenant or his heirs."

This definition was further amended by substituting clause (ii) by the following clause by Act XXIV of 1973 :

> " (ii) includes—
>
> (*a*) any such person as is referred to in sub-clause (i) who continues in possession of the land after the determination of the tenancy agreement,
>
> (*b*) any person who was a tenant in respect of such land under a tenancy agreement to which this Act is applicable under sub-section (3) of section 1 and who or any of his predecessors in interest had erected any building on such land and who continues in actual

1. I.L.R. (1963) Mad. 1054 : 76 L.W. 381: A.I.R. 1963 Mad. 369.
2. (1969) 2 M.L.J. 541.

physical possession of such land and building, notwithstanding that—

(1) such person was not entitled to the rights under this Act by reason of the proviso to section 12 of this Act as it stood before the date of the publication of the Madras City Tenants Protection (Amendment) Act, 1972 (Tamil Nadu Act IV of 1972), or

(2) a decree for declaration or a decree or an order for possession or for similar relief has been passed aginst such person on the ground that the proviso to section 12 of this Act as it stood before the date of the publication of the Madras City Tenants Protection (Amendment) Act, 1972 (Tamil Nadu Act IV of 1972) disentitled such person from claiming the rights under this Act, and

(c) the heirs of any such person as is referred to in sub-clause (i) or sub-clause (ii) (*a*) or (ii) (*b*) but does not include a sub-tenant or his heirs."

It would be seen frem the definition, as it originally stood, that it included within the term "tenant" every other person deriving title from him. These words would include not only the heirs of the tenant, but also an assignee of such tenant. But by the substituted definition of the word, " tenant " by Tamil Nadu Act XIII of 1960, the heirs of the tenant alone were included in the definition and the assignees were excluded. The effect of this amendment came up for consideration before this Court in *Kuppa Bai* v. *Rajagopal Nadar*[1]. In that case, the suit was filed for eviction against two defendants. The first defendant was the wife of the original tenant and the second defendant was assignee of the site and building by the first defendant. The assignment, in that case, was on 22nd June, 1960, before the definition was amended by Tamil Nadu Act XIII of 1960. It was held that the amended definition restricted the right to the heirs of a tenant only and the right of the assignees which was originally included was taken away. The learned Judge also considered that though, on the day when the assignment was effected in that case, the amended definition had not come into force, and on the definition as it originally stood, even an assignee would be entitled to the protection under the Act, the amended definition would have to be applied even in respect of that tenancy. In other words, the amended definition was held to be applicable even to assignments made before the amendment. Thus, the position subsequent to the amendment of the definition in 1960 was that an assignee of the superstructure and the tenancy right will not be entitled to the benefit of the Act irrespective of the fact whether the assignment was prior to 1960 or subsequent to 1960.

1. (1969) 2 M.L.J. 541.

3. Tenants entitled to the protection under the Act were given certain special rights under the provisions of the Act. Broadly stated, they are entitled to purchase the land in which they had put up a superstructure or entitled to get the compensation for the superstructure on eviction. Under the original definition as seen already, the tenant was also entitled to assign these rights to any person. But, this was subject to the provisions of section 12. That section, before it was amended, in 1972, read as follows :—

" Nothing in any contract made by a tenant shall take away or limit his rights under this Act, provided that nothing herein contained shall affect any stipulation made by the tenant in writing registered as to the erection of building, in so far as they relate to buildings erected after the date of the contract."

Considering this provision, the Supreme Court held in *Haridas Girdharidas* v. *Varadaraja Pillai*[1], that, where under a registered lease, the lessee had agreed to put up a construction on the site leased to him according to certain specifications after the prior approval of the lessors at a particular cost and covenanted that on the expiry of the lease, the lessor shall have the option of buying the building and if the lessor was not willing to purchase, the lessee shall be at liberty to remove and carry away the erections, that clause in the deed amounted to a

1. (1973) 2 S.C.J. 484: (1973) 2 M.L.J. (S.C.) 45 : (1973) 2 An.W.R. (S.C.) 45: (1972) 1 S.C.R. 291: (1971) 2 S.C.C. 601: (1971) R.C.J. 959: A.I.R. 1971 S.C. 2366.

stipulation as to the erection of the building within the meaning of the proviso to section 12 and that, therefore, the lessee would not be entitled to claim either the compensation for the building or a right to purchase and land itself. Thus, the protection given under the Act was held to be taken away if there was a stipulation to that effect in the lease deed itself. The Legislature amended section 12 by the Tamil Nadu Act IV of 1972 deleting the proviso to that section and restoring the right of the tenant even if the lease deed contained any stipulation as to the erection of the building.

4. Thus, after the amendment in 1972, the position of the tenant was, he will be entitled to purchase the land under section 9 or get compensation for the superstructure in spite of the fact, that under the lease deed, he had agreed not to claim compensation in respect of the superstructure or agreed to remove the same. But, the assignee will not be entitled to this protection under the Act. To put it negatively, the right of the tenant to assign the leasehold right and the superstructure to any person with rights under the Act was taken away. At this stage, the Legislature has amended the definition of the term " tenant " by Tamil Nadu Act XXIV of 1973.

5. The definition itself has been extracted already in the earlier part of this judgment. It is seen from sub-clause (*b*) of clause (ii) of clause (4) of section 2 that three conditions will have to be satisfied in order that a person may come under that clause. One is, under the first part of that provision, he must be a tenant in respect of the land under a tenancy agreement to which the Act is applicable under sub-section (3) of section 1. That means, the tenancy agreement in respect of the land in his favour should have been prior to the coming into force of Tamil Nadu Act XIX of 1955, namely, 12tn September, 1965. The second condition is, such a tenant or any of his predecessors-in-interest shall have erected the building on such land. These conditions clearly show that not only the tenancy and the erection of the building should be prior to 12th September, 1965 but; in cases where the tenant has assigned, the assignment must also be prior to 12th September, 1955. The third condition is the person who claims the right under the Act should have continued in actual physical possession of such land and building. These three conditions, in my opinion, clearly show that the definition of the term 'tenant' is intended to include an assignee of such tenant of the land and superstructure, provided the assignment was prior to 12th September, 1955 and the assignee continued to remain in possession thereafter. The *non-obstante* clauses 1 and 2 of this sub-clause gave the benefit of the protection to such an assignee in spite of the fact that the lease deed executed by the assignor contained a provision with reference to the erection of the building within the proviso to section 12 which was deleted in 1972 or a decree had been granted, when the proviso was in operation, disentitling the tenant or the assignee from claiming the rights under the Act. I am therefore of opinion that though an assignee is now given protection under the Act, it is not all assignees that will got the protection, but it is those assignees of lands and buildings who got the assignment prior to 12th September, 1955 and continued in possession thereafter, that will be entitled to the benefit of the protection under the amended definition of the term 'tenant'. In this case, the assignment in favour of the appellant's predecessor, *viz*., the second defendant, was on 15th July, 1965 and therefore, he will not be entitled to the protection of the City Tenants Protection Act.

6. The next question for consideration is, whether, though the second defendant was not entitled to the protection under the Act since the first defendant was a tenant, the plaintiff is liable to pay the compensation for the superstructure. The learned counsel for the appellants submitted that the decree could not be granted without directing the plaintiff to pay the compensation for the superstructure to the first defendant. The Trial Court, while decreeing the suit for vacant possession, held that the first and second defendants were not entitled to any compensation for the superstructure, but that they are entitled to remove the superstructure before delivering possession.

The first defendant has not appealed against this decree. Apart from this, I am also unable to see how the first defendant would be entitled to compensation after he has assigned the superstructure to the second defendant. Though the assignee is not entitled to the benefit of the protection under the Act, the assignment itself is not invalidated. Therefore, the first defendant had ceased to be the owner of the superstructure. If the compensation is to be paid for the superstructure the first defendant would not be in a poistion to hand over possession of the superstructure to the plaintiff. Therefore, in cases where the original tenant had assigned the leasehold rights and the superstructure put up by him, he will not be entitled to compensation also for the superstructure as such. Therefore, while it is open to the second defendant to remove the superstructure before handing over vacant possession of the site, neither the first defendant nor the second defendant would be entitled to compensation for the superstructure.

7. It was next contended by the learned counsel for the appellants that the plaintiff is not properly represented by the Parish Priest. This contention is based on the ground that the property is vested in the Archbishop of Madras and the Parish Priest who had filed the suit on behalf of Saint Francis Xavier Church, had not shown his authority to represent the Church in this suit and that therefore the suit was not properly laid. This is a suit by a landlord for eviction. The definition under the Act includes within the word "landlord" every person entitled to collect the rent of the whole or any portion of the land. It is not in dispute that prior to the assignment the first defendant was paying rent to the Parish Priest of this Church. It is not shown that he was illegally collecting the rent or he was not authorised to collect the same. Therefore, the Parish Priest was entitled to lay the suit on behalf of the Church. But, I am bound to add that I would have expected the Parish Priest to have shown his authority to represent the Church when the defendants raised specific plea that he had no authority to represent and only the Archbishop of Madras could have represented the Church. He could have easily shown his authority to represent either by producing an authority from the Archbishop himself or with reference to any of his duties and functions as Parish Priest with reference to the Church itself. But, since I have already held that, as a person entitled to receive the rent, he could have filed the suit, the suit itself is not liable to be dismissed on the ground that it could not have been maintained by him. Though the learned counsel for the appellants raised the further question that the second defendant had not been issued notice as required by section 11 of the Act and that, therefore, the suit is not maintainable, in view of my finding that he is not a tenant entitled to the protection of the Act, he will not be entitled to a notice also under that provision.

8. For the foregoing reasons, the decree of the Courts below is confirmed and the seocnd appeal is dismissed. There will be no order as to costs. No leave. The appellants are given three months' time from this date to remove the superstructure and give vacant possession of the site to the plaintiff.

S.J. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*K. Veeraswami, C.J. and S. Natarajan, J.*

The State Bank of India, Kuzhithurai Branch, represented by their Branch Manager, Kanyakumari District .. *Appellant**

v.

N. Sundara Money .. *Respondent.*

Industrial Disputes Act (XIV of 1947), section 2 (oo)—Termination of appointment—Mention in appointment order—Whether retrenchment—Termination "by the employer"—Meaning of.

It is true that the word "termination" in the definition (in the Industrial Disputes Act) is followed by the words 'by the employer'. But this is not indicative of the fact that termination should always

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*W.A. No. 231 of 1973. *24th March, 1975.*

and necessarily be by a separate order or an expression independently of the appointment order of the period of termination of employment. In either case, whether by notice or by efflux ion of time, termination will be by the employer. [*Para.* 2.]

If there is any indication in some form or other in the same document making the appointment or in any other way, and the time at which the employment is to come to an end is indicated, that will be a termination by the employer within the meaning of the definition of "retrenchment". [*Para.* 2.]

Cases referred to :—

R.v. Secretary of State, (1973) 2 All E.R. 104 ; *Murugesa Naicker Company* v. *Labour Court*, (1963) 1 L.L.J. 495 ; *Hari Prasad* v. *A.D. Divalkar*, (1957) 1 L.L.J. 243 : 1957 S.C.J. 83 : 1957 S.C.R. 121 : A.I.R. 1957 S.C. 121 ; *Central Bank of India* v. *Raja Gopalan*, (1963) 2 L.L.J. 89 : (1964) 2 S.C.J. 176 : (1964) 3 S.C.R. 140 : A.I.R. 1964 S.C. 743 ; *L. Krishnan* v. *Southern Railway* (1972) 2 L.L.J. 568 ; *Agents and Manufacturers* v. *E.S.I Corporation*, (1972) 2 L.L.J. 446; *Management, W.B. India Ltd.* v. *Jagannath*, A.I.R. 1974 S.C. 1166.

Appeal under Clause 15 of the Letters Patent against the order of Mr. Justice K.N. Mudaliyar dated 19th July, 1973 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 3129 of 1972 presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the concerned records from the respondent, the State Bank of India, Kuzhithurai Branch represented by their Branch Manager, quash the order of appointment for temporary clerks, cashiers in R.R.No. 12, dated 10th November, 1972.

R. Narayanaswami, for Appellant.

A. Ramachandran of Row & Reddy, for Respondent.

The Judgment of the Court was delivered by

Veeraswami CJ.—This appeal raises a point with reference to which the arguments are somewhat nicely balanced. The respondent, a B.Sc., graduate of the Madras University, was employed between 4th July, 1970 and 18th November, 1972 as a cashier in the Kuzhithurai Branch of the appellant bank. There were intermittant breaks in the service. The last order of appointment dated 10th November, 1972 recited that the respondent was appointed with effect from that date for a period of nine days on a salary of Rs.200 per mensem and dearness and other allowances as applicable under the Desai Award. This followed certain terms and conditions, of which the first two are :

> "(1) The appointment is purely a temporary one for a period of 9 days but may be terminated earlier, without assigning any reason therefor at the bank's discretion ;
>
> (2) The employment, unless terminated earlier, will automatically cease at the expiry of the period *i.e.*, 18th November, 1972."

There was the third condition, which prescribed that if the respondent wished to leave the service before, he should give 14 days' notice in writing failing which he would be held liable for a week's pay. Curiously, the last term was that the temporary appointment would not confer on the respondent any right to claim for absorption in the bank's permanent establishment in any category. The respondent applied to have this order of appointment quashed and a direction to issued to the appellant to renew him as cashier. The ground of the respondent was that he had actually worked for 240 days, that as such he had a continuous service which qualified him for his statutory retrenchment compensation under section 25-F of the Industrial Disputes Act, 1947, and that since this provision was not complied with, the order limiting the period of service amounting to termination was invalid. K.N. Mudaliyar, J., who considered the petition, allowed it on the view that although there was no separate order terminating the respondent's services, the provision in the appointment order aforesaid bringing about an automatic termination amounted to a termination and a "retrenchment." within the meaning of the term as defined by section

2(oo) of the Industrial Disputes Act. He quashed the appointment order, but said that he would forbear from giving any further direction. The bank appeals.

2. Mr. M.R. Narayanaswami, for the appellant-bank submits that:

(1) there is no termination in this case of the respondent's services so as to satisfy the definition of retrenchment., and (2) in any case retrenchment could only be of surplus labour, which was not the case here.

The definition of "retrenchment" says that it means the termination by the employer of the services of a workmen for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action. Three categories of termination or cessation of service are excluded from the purview of the definition such as voluntary retirement of the workman, retirement on superannuation in case the contract of employment provides for cessation of service at that stage and termination of the service of workmen on the ground of continued ill-health. Section 25F makes it a condition precedent to retrenchment of a workman that he be given a month's notice in writing indicating the reason for retrenchment or in the alternative he be paid wages for the period of notice in lieu of it. There is a proviso to the effect that no such notice is necessary if the retrenchment is under an agreement which specifies a date for the termination of service. One other qualifying requisite for retrenchment is that the workmen should have been in continuous service for not less than one year under an employer. 'Continuous service' has been defined too. But there is no dispute in this case that the respondent had put in such continuous service. The appellant's stand, with reference to retrenchment as defined, is that it is not any termination that will fall within its purview but only that made by the employer, be it by a separate order or under an agreement, which specifies a date for the termination of service. But, here, as in this case, an appointment is for a specified period indicating the dates on which it takes effect and it comes to an end, there is no room for any termination. That is, what the appellant contends. 'Termination' in its normal significance is bringing to an end, cessation, or coming to a close. But emphasis is laid by Mr. M. R. Narayanaswami on the phrase 'by the employer' immediately following the word 'termination', and he wants to read the phraseology put together and contend that it must be a termination by the employer, which, according to him, means, by an order issued by the employer and not a case of automatic coming to a close of the employment by reason of the fact that its commencement and cessation is indicated by the appointment order itself. In support of this contention, learned counsel for the appellant has relied on *R.* v. *Secretary of State*[1]. The Court of Appeal, in that case, was concerned with an appointment of a medical assistant in geriatrics in a group of hospitals in the United Kingdom, for a two year period reasonable subject to confirmation, for an indefinite period. At the end of the period, he was not renewed, and he claimed to be entitled to make representations against his dismissal as he considered it. The Court of Appeal held that the words "being unfairly terminated" in the term of contract providing for representations against dismissal, postulated some positive action by the hospital Board bringing the appointment to an end, *e.g.*, by notice. The relative words which came up for interpretation were .... surgeon considers that his appointment is "being unfairly terminated" and the English Court was concerned with the question whether, in the circumstances mentioned, the surgeon was unfairly terminated. Lord Denning, M. R. while dealing with the question, said:

> "I think that the word 'terminate' or 'termination' is by itself ambiguous. It can refer to either of two things either to termination by notice or to termination by effluxion of time. It is often used in that dual sense in landlord and tenant and in master and servant cases. But there are several indications in this paragraph to show that it refers here only to termination by notice."

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1. (1973) 2 All ER 104.

Then, the learned Master of the Rolls went on to point out those special features which persuaded him to take the view he did. Buckley, L. J., put the matter thus :

> "In my judgment the words are not capable of bearing that meaning.
>
> As counsel for the Secretary of State has pointed out, the verb 'terminate' can be used either transitively or intransitively. A contract may be said to terminate when it comes to an end by effluxion of time, or it may be said to be terminated when it is determined at notice or otherwise by some act of one of the parties. Here in my judgment the word 'terminated' is used in this passage in para. 190 in the transitive sense, and it postulates some act by somebody which is to bring the appointment to an end, and is not applicable to a case in which the appointment comes to an end merely by effluxion of time."

On that view, he agreed with the view of Lord Denning, M R. We respectfully agree with the observations of the Court of Appeal in respect of the words "terminate" or "termination." But the question is, is it in that sense that word has been used in section 2 (*oo*) of the Industrial Disputes Act.

Is there any indication in the definition or in the context of the rest of the provisions of the Act to conclude that 'termination' in section 2 (*oo*) means only that by notice but not also that by effluxion of time? True it is that the word 'termination' in the definition is followed by the words ' by the employer.' But, to our minds, it is not indicative of the fact that termination should always and necessarily be by a separate order or an expression independently of the appointment order of the period of termination of employment. In either case, whether by notice or by effluxion of time, termination will be by the employer. The words by 'the employer' are used only to indicate the contract of cessation of employment by an act of the workman himself and that is what is indicated in clause (*a*) of section 2 (*oo*) namely, voluntary retirement of the workman . That will also be a case of termination or cessation of employment. Again clause (*b*) relating to retirement by superannuation also is a kind of termination. But it takes effect with reference to the fact of superannuation, and that is expressly excluded from the purview of retrenchment. Termination of servic of a workman on the ground of continued ill-health also is not retrenchment. These three illustrations, which are given in the definition section itself, as they seem to us, point to the fact that termination need not necessarily by a separate order of the employer. If there is any indication in some form or other in the same document making the appointment or in any other way, and the time at which employment is to come to an end is indicated, that will be a termination, in our opinion, by the employer within the meaning of the definition of 'retrenchment'. Reference may also be made to the other provisions in Chapter V-A relating to lay-off and retrenchment. The object of this chapter is to provide certain benefits to workmen. Section 25-F safeguards continuity of service of an employee who had put in a continuous period of service within the meaning of that section by providing the benefits contemplated by it, subject to condition. The proviso is rather significant, because, that contemplates a case where no notice is necessary for qualifying for retrenchment where an agreement specifies a date for termination of service. It may be noted that though no separate order by an employer is issued, still, because termination of service is provided for and agreed to that it should take place on a specified date, the workman is given the retrenchment benefit. That is another indication, in our opinion, against the contention of the appellant restricting the scope of retrenchment for purposes of the Industrial Disputes Act.

3. A number of decided cases have been brought to our notice on either side. But, in our opinion, none of them has a direct bearing on the question we are called upon to decide. In *Murugesa Naicker Co.* v. *Labour Court*[1], one of us dealt with the definition in the light of earlier decided cases particularly, *Hariprasad* v. *A. D. Divelkar*[2], and held that the

1. (1963) 1 L.L.J. 495.
2. (1957) 1 L.L.J. 243 : 1957 S.C.J. 83 : 1957 S.C.R. 121 : A.I.R. 1957 S.C. 121

word 'retrenchment' should be understood in the ordinary sense and that it is not every termination that can be retrenchment, but termination , in order to be retrenchment, should be of surplus labour or staff and in an industry which is continuing and not closed or transferred. The view was accepted in *V.V.S. Subba Rao* v. *The Presiding Officer, Labour Court, Madras and another*[1], Mr. Ramachandran, defending as he was, the appeal drew our attention to *Central Bank of India* v. *Raja Gopalan*[2], which really related to the scope of section 33-C (2) of the Industrial Disputes Act, and *L. Krishnan* v. *Southern Railway*[3], which lays emphasis on the fact that an order of termination to be retrenchment it must be of surplus labour. *Agents and Manufacturers* v. *E.S.I. Corporation*[4], decides that a temporary workman was entitled to the benefit of retrenchment provided he satisfied the conditions of section 25-F. *Management, W.B. of India Ltd.* v. *Jagannath*[5], was a case of an employee who worked for wages from day to day, but for a continuous period, and the question in his case was whether he was entitled to retrenchment benefits. The letters of appointment contained a provision that a certain period of notice should be given before termination of service and the decision proceeded on that basis. It is thus clear that none of these decisions is in point in this case.

4. The only other question which Mr. Narayanaswami for the appellant pressed before us is that even assuming that this is a case of termination within the meaning of the definition of the word 'retrenchment' in section 2 (*oo*), this was not a case of termination of surplus labour. But in the counter-affidavit, it is disclosed that the respondent ceased to be employed because the permanent incumbent as cashier came in. Mr. Narayanaswami, explains that in order to meet the exceptional and extraordinary contingencies in vacancies, from time to time temporary employees are drafted on terms as in the case of the respondent and that, therefore looked at from that point of view, it cannot be regarded that this was a case of surplus. We recognise that there is some force in this case. But it cannot be denied at the same time that because the permanent incumbent comes in, the temproary employee goes out, which really menas that he becomes a surplus.

5. We are, therefore, of opinion that the respondent's, stand is correct,namely, that he was entitled to retrenchment compensation and that inasmuchas it was not paid, but nevertheless he was terminated, the termination would be invalid. This, of course, leads to a strange result. But sometimes the working of the law is surprising which the Court cannot help. The appeal is, therefore, dismissed but with no costs.

6. Mr.Narayanaswami, applies for leave under Article 133 (1) of the Constitution of India. The question involved in this case is bereft of authority as it has been, and as we said, the arguments are very nicely balanced. Since it is a substantial question of law of public importance, we grant leave to appeal under Article 133 of the Constitution.

S.J. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—*P.S. Kailasam and C.J.R. Paul, JJ.*

In the matter of P. Govidarajulu Naidu father of the petitioner herein.

G. Bhuvaragavalu .. *Petitioner**

v.

The Collector and District Magistrate, South Arcot at Cuddalore .. *Respondent.*

Maintenance of Internal Security Act (XXVI of 1971), section 3 (1) (a)—Order of detention—Three grounds relied on—One ground non-existent—Another ground vague—Detention order—Whether fails.

Where two very important grounds out of the three mentioned in the order of detention have failed it is not unreasonable to hold that the detaining authority would not have ordered the detention if he

1. W.A.No. 5 of 1972.
2. (1963) 2 L.L.J. 89 : (1964) 2 S.C.J. 176: (1964) 3 S.C.R. 140 : A.I.R. 1964 S.C. 743.
3. (1972) 2 L.L.J. 568.
4. (1972) 2 L.L.J. 446.
5. A.I.R. 1974 S.C. 1166.

*W.P.No 659 of 1975. 25*th March*, 1975.

realised that the two grounds which have failed were non-existent. The order of detention cannot be upheld in those circumstances. [*Para.* 14.]

Cases referred to :—

Ram Bahadur Rai v. *State of Bihar*, (1975) Crl.L.J. 269 : (1975) S.C.C. (Crl.) 160 : A.I.R. 1975 S.C. 223; *Dwarika Prasad Sahu* v. *State of Bihar*, (1975) Crl.L.J. 221 : (1975) 1 S.C. W.R. 148 : (1975) S.C.C. (Crl.) 177 : A.I.R. 1975 S.C. 134; *Moti Lal* v. *State of Bihar*, (1969) M.L.J. (Crl) 49 : (1969) 1 S.C.J. 68 : (1968) 3 S.C.R. 587 : A.I.R. 1968 S.C. 1509; *Dwarka Dass Bhatia* v. *State of Jammu and Kashmir*, 1957 S.C.J. 133 : 1956 S.C.R. 948 : (1957) M.L.J. (Crl.) 58 : A.I.R. 1957 S.C. 164.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *habeas corpus* directing the respondent, herein to produce before this Court the person of Govindarajulu Naidu (father of the Petitioner herein) now detained in the Central gail Vellore and set him at liberty.

K.T. Palpandian, for Petitioner.

The Public Prosecutor, for Respondent.

The Order of the Court was pronounced by

Kailasam, J.—This writ petition is filed for the issue of a writ *habeas corpus* by the son of P. Govindarajulu Naidu for directing the detenue Govindarajulu Naidu to be produced in Court and set at liberty

2. The order of detention was passed on 5th February, 1975 and the detenu was arrested on 7th February, 1975. The memorandum of grounds was furnished to the detenu on his arrest. On behalf of the detenu, it is submitted that the grounds are not true and that they are totally vague and vitiating the entire order of detention.

3. The order of detention made under section 3 (1) (*a*) (iii) of the Maintenance of Internal Security Act, 1971, mentions three instances on which the Collector relied for coming to the conclusion that the detenu should be detained as he was acting prejudicially to the maintenance of supplies and services essential to the community.

4. The first ground is that the detenu being a wholesaler in paddy and rice in Licence No. 605 from 1971, in flagrant contravention of the Essential Commodities Act and conditions of the licence indulged in an act to sell 50 bags of raw rice and 50 bags of boiled rice to the Coimbatore Urban Co-operative Society Limited, Coimbatore on 28th September, 1974 having known that the entire South Arcot District had been declared as a notified area under G.O. Ms. No. 325, Food Department, dated 10th September, 1974 by which movement of paddy and rice from the district without a valid permit is prohibited. On behalf of the detenu it is represented that the entire ground is baseless. The Collector of Coimbatore by his letter L. Dis. 15573 of 1974, dated 28th September, 1974 addressed the Collector of South Arcot requesting him to issue a necessary permit to enable the Secretary of the Coimbatore Urban Co-operative Stores to purchase and move rice from South Arcot to Coimbatore District. On the basis of this certificate the detenu agreed to sell rice to the said Co-operative Stores on condition that the rice would be delivered only on an authorisation issued by the Collector of South Arcot District. The Secretary of the Co-operative Stores, Coimbatore, also applied to the Collector of South Arcot by his petition dated 1st October, 1974 setting out the circumstances mentioned above and requested the Collector for the issue of necessary authorisation. The Collector declined to accord permission and the transaction fell through and the sale was not effected. This statement of fact is not disputed by the Government. The contention of the learned counsel for the petitioner that the ground is not existent is therefore correct. There was no sale by the detenu in contravention of any of the restrictions relating to the transport of rice On the other hand, the detenu had properly requested the Co-operative Stores to produce a permit from the Collector before he could sell the rice.

5. The third ground runs as follows: On your directions and instruction under Collusion with the said Thiru Dharma Naidu, you had transported illicitly on several occasions between 8th January, 1975 to 24th January, 1975 rice and

paddy bags from South Arcot to Salem to the said A. Rajendran of Salem and others without a valid permit and by using undated letters and bills as if the stock of bran, was being transported, while in fact you had transported illicitly rice and paddy in contravention of the orders." The submission of the learned counsel for the petitioner is that the ground is vague. The ground alleges that on several occasions between 8th January, 1975 to 24th January, 1975 the detenu transported rice and paddy bags illicitly from South Arcot to Salem to one A. Rajendran without a valid permit. The ground does not specify on what date and in what manner the paddy was illicitly transported. It does not mention what the several occasions referred to in the ground are. We accept the contention of the learned counsel for the petitioner that the ground is so vague that he cannot make an effective representation.

6. The second ground relates to an attempt to transport 72 bags of paddy and one bag of rice in a lorry MDF 5765 belonging to one Thiru Dharma Naidu on 1st February, 1975 illicitly without a permit, by the detenu with the connivance of the said Thiru Dharma Naidu. Even accepting that the second ground is valid, the order of detention cannot be upheld.

7. It is not disputed that the first ground is a very serious one and the order of detention was mainly based on that ground. That ground as we have already pointed out is non-existent. The third ground is also totally vague and an opportunity of making a representation guaranteed under Article 22 (5) of the Constitution has been denied to him.

8. On behalf of the detenu, it was submitted that if one ground is bad the entire order of detention fails. The learned counsel relied on two decisions of the Supreme Court. In *Ram Bahadur Rai* v. *State of Bihar*[1], it was held :

> "Where the order of detention is founded on distinct and separate grounds if any one of the grounds is vague or irrelevant the entire order must fall."

In *Dwarika Prasad Sahu* v. *State of Bihar*[1] the Supreme Court observes at page 138 :

> "If there is one principle more firmly established than any other in this field to jurisprudence, it is that even if one of the grounds or reasons which led to the subjective satisfaction of the detaining authority is non-existent or misconceived or irrelevant, the order of detention would be invalid and it would not avail the detaining authority to contend that the other grounds or reasons are good and do not suffer from any infirmity because it can never be predicated to what extent the bad grounds or reasons operated on the mind of the detaining authority or whether the detention order would have been made at all if the bad ground or reason were excluded and the good grounds or reasons alone were before the detaining authority."

9. In making this statement of law, the Supreme Court referred to a number of decisions.

10. The learned Public Prosecutor submitted that the observations of the Supreme Court will have to be taken along with the observations made by the Supreme Court in earlier decisions. Particular reference was made by the Public Prosecutor to a decision of a Bench of six Judges of the Supreme Court in *Motilal* v. *State of Bihar*[2], wherein Justice Hegde, has laid down the law in the following terms, after referring to the decision in *Dwarka Dass Bhatia* v. *State of Jammu and Kashmir*[3] :

> "The subjective satisfaction of the detaining authority must be properly based on all the reasons on which it purports to be based. If some out of those reasons are found to be non-existent or irrelevant, the Court cannot predicate what the subjective satisfaction of the authority would have been on the exclusion of those reasons. To uphold the order on the remaining reasons would

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1. (1975) Crl.L.J. 269 : (1975) S.C.C. (Crl). 160 : A.I.R. 1975 S.C. 223.

1. (1975) Crl.L.J. 221 : (1975) 1 S.C.W.R. 148 : (1975) S.C C. (Crl.) 177 : A.I.R. 1975 S.C. 134.
2. (1969) M.L.J. (Crl.) 49 : (1969) 1 S.C.J. 68 : (1968) 3 S.C.R. 587 : A.I.R. 1968 S.C. 1509.
3. 1957 S.C.J. 133 : 1956 S.C.R. 948 : (1957) M.L.J. (Crl.) 58 : A.I.R. 1957 S.C. 164

be to substitute the objective standards of the Court for the subjective satisfaction of the authority."

Having stated so, the Supreme Court proceeded to caution that the Court must however, be satisfied that the vague or irrelevant grounds are such as, if excluded, might reasonably have affected the subjective satisfaction of the authority.

11. The learned Public Prosecutor submitted that the law as laid down in *Dwarika Prasad* v. *State of Bihar*[1], must be read along with the above observations.

12. In *Dwarka Dass Bhatia* v. *State of Jammu and Kashmir*[2], which has been referred to by Justice Hegde in *Motilal* v. *State of Bihar*[3], the Court observed :

"In applying these principles, however, the Court must be satisfied that the vague or irrelevant grounds are such as, if excluded, might reasonably have affected the subjective satisfaction of the appropriate authority. It is not merely because some ground or reason of a comparatively unessential nature is defective that such an order based on subjective satisfaction can be held to be invalid. The Court while anxious to safeguard the personal liberty of the individual will not lightly interfere with such orders."

13. It is in the light of these principles that the validity of the impugned order has to be judged. Relying on the above passages, the learned Public Prosecutor submitted that the law laid down in *Dwarika Prasad* v. *State of Bihar*[1], will have to be read along with the caution administered by fuller Bench of the Supreme Court.

14. It is unnecessary for us to go into this question as we are satisfied that in this case, two very important grounds out of the three have failed. It is not unreasonable to hold that the detaining authority would not have ordered the detention if he realised that the two grounds which have failed were non-existent. In these circumstances we feel that the order of detention cannot be upheld. The petition is allowed and the detenu is directed to be set at liberty.

R.S. ——— *Petition allowed.*

1. (1975) 1 S.C.W.R. 148 : (1975) Crl.L.J. 221: (1975) S.C.C. (Crl.) 177 : A.I.R. 1975 S.C. 134.
2. 1957 S.C.J. 133 : A.I.R. 1957 S.C. 164.
3. (1969) 1 S.C.J. 68 : A.I.R. 1968 S.C. 1509.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*S. Ratnavelpandian, J.*

Vellapandi *alias* **Maruthiah Thevar and others** .. *Petitioners**

v.

Annathaiammal and another .. *Respondents.*

Criminal Procedure Code (V of 1898), section 203—Indian Penal Code (XLV of 1860), sections 495 and 109—Offences under—Complaint—Dismissal by Sub-Divisional Magistrate—Revision to District Magistrate—Remand for fresh enquiry—Notice to accused—Whether necessary.

It cannot be said that the order of the District Magistrate setting aside the order of the learned Sub-Divisional Magistrate dismissing a complaint under section 203, Criminal Procedure Code, without issuing a notice to the petitioner, is vitiated on that ground. [*Para.* 3.]

Cases referred to :—

Appa Rao v. *Janaki Ammal*, 51 M.L.J. 605 : I.L.R. 49 Mad. 918: A.I.R. 1926 Mad. 19 at 21 (F.B.); *Thanikachala Mudali* v. *Ponnappa Mudali*, (1947) 1 M.L.J. 368 : (1947) M.W.N. (Crl.) 98: A.I.R. 1947 Mad. 389.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the District Magistrate (J), Tirunelveli dated 9th May, 1973 and made in Crl. Revision Petition No. 7 of 1973 (Calendar Case No. 16 of 1973 on the file of the Court of the Sub-Divisional Magistrate, Shencottah).

C.K. Venkatanarasimhan and *V. Pandiarajan*, for Petitioners.

V. Muthuperumal and *P. Chandrasekaran* for the Public Prosecutor, for Respondents.

The Court made the following

* Crl.R.C.No. 623 of 1973; and Crl.R.P.No. 612 of 1973. 31st *March*, 1975.

ORDER.—This revision petition is directed against the order of the learned District Magistrate (*J*), of Tirunelveli, in Cr. R. P. No. 7 of 1973 on his file, setting aside the order passed by the learned Sub-Divisional Magistrate of Shencottah dismissing the complaint under section 203, Criminal Procedure Code, filed by the respondent complainant in C. C. 16 of 1973 against the petitioners for an offence under sections 494 and 109, Indian Penal Code, read with section 17 of the Hindu Marriage Act, on the allegation that the complainant is the lawfully wedded wife of accused-1 (first petitioner herein) and that while the said marriage between them is still subsisting, he married one Piramayee as his second wife and then he (accused-1) married accused 2 (second petitioner) abour 1½ years ago, as his third wife on the 12th of Ani, at 10 A. M. at Courtallam and that accused 3 to 11 abetted the commission of the said offence of bigamy.

2. The learned District Magistrate, on setting aside the order of dismissal, passed an order remanding the case to the learned Sub-Divisional Magistrate, Kovilpatti, for further enquiry and disposal according to law. The petitioners herein who were arrayed as accused in the complaint, now challenge the order of the learned District Magistrate on the main ground that the lower Court, while exercising its revisional jurisdiction, ought to have given notice to the accused and heard them before passing the the final order, as the impugned order has diversely affected them. The other ground *viz*., that the complaint is filed after a delay of 1½ years and that the reasons given by the learned Sub-Divisional Magistrate, Shencottah, have not been discussed, is not pressed by the learned counsel for the petitioners in this revision petition. So, the only question before me is whether a notice should be given to the proposed accused in a proceeding on revision under Chapter XXXII of the Criminal Procedure Code.

3. In view of the observations made by the Full Bench of our High Court in *Appa Rao* v. *Janaki Ammal*[1], followed in *Thamkachala Mudali* v. *Ponnappa Mudali*[1], it cannot be said that the order of the District Magistrate setting aside the order of the learned Sub-Divisional Magistrate dismissing the complaint under section 203, Criminal Procedure Code, without issuing a notice to the petitioners herein is vitiated.

4. In the result, this revision petition is dismissed.

R.S. ——— *Petition dismissed.*

1. 51 M.L.J. 605: I.L.R. 49 Mad. 918: A.I.R. 1927 Mad. 19

1. (1947) 1 M.L.J. 368: (1947) M.W.N. (Crl.) 98: A.I.R. 1947 Mad. 389.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*K. Veeraswami*, *CJ*. and *S. Natarajan*, *J*.

Permatha (died) and another .. *Appellants**

v.

Ramaswami and others .. *Respondents.*

Hindu Women's Right to Property Act (XVIII of 1937), section 3 (2)—Suit for partition—Joint family—Wife separated from husband and joint family by family settlement—Death of husband—Widow whether can claim share in joint family properties.

Sub-section (2) of section 3 of the Hindu Women's Right to Property Act, 1937 can be applied only to an interest in the properties of a joint-family of which the widow is a member.

[*Para*. 3.]

Cases referred to:—

Ranganayakamma v. *Rajesaramma*, (1964) 1 An.W.R. 231: A.I.R. 1964 A.P. 380: *Chinnathayi* v. *Panliya Naicker*, (1961) 3 S.C.R. 592: A.I.R. 1962 S.C. 29.

Appeal under Clause 15 of the Letters Patent against the order of The Honourable Mr. Justice Alagiriswami dated 20th January, 1969 and made in S. A. No. 305 of 1965 preferred to the High Court against the decree of the Court of the Subordinate Judge, Salem dated 13th July, 1964 and passed in A. S. No. 313 of 1963 (O. S. No. 324 of 1961 District Munsif's Court, Krishnagiri).

* L.P.A. No. 76 of 1969. *8th January*, 1975.

N. Appu Rao, for Appellant.

The Judgment of the Court was delivered by

Veeraswami, CJ.—This appeal arises under the Letters Patent from the judgment of Alagiriswami, J., who, concurring with the first appellate Court, dismissed the second appeal by the appellant who was the plaintiff. Her husband died intestate on 14th July, 1952. She was the second wife and had two sons by him. Years back, as a result of misunderstanding between her and her husband, the appellant instituted maintenance proceedings under the Code of Criminal Procedure and obtained a maintenance order. A suit brought by the husband to have that order cancelled, ended in a compromise which resulted in what we regard as a family settlement dated 24th December, 1930. The substance of this document was that the husband and his son by his first wife should take certain properties and live as joint Hindu family and the second wife and the two sons by her represented by their mother as guardian should take certain properties mentioned in the Schedule to the document and live as a separate family. Basing her claim on the Hindu Women's Right to Property Act, 1937, she brought the suit out of which the second appeal arose for partition and separate possession of the share of her husband in the joint family consisting of himself and his son by the first wife. The trial Court granted a preliminary decree which was, however, reversed in appeal with which Alagiriswami, J., agreed.

2. The question for decision is somewhat not free from doubt but on the whole we have come to the conclusion that the present appeal should be dismissed. Counsel for the appellant presses upon us a literal reading of sub-section (2) of section 3 of the Act. He says that the appellant's husband having died intestate and as a member of a Hindu joint family, she would be entitled, as his widow, to the same share as her husband had. On the first bush the argument appeared to be attractive and even received support from *Ranganayakamma* v. *Rajesaramma*[1]. Chandra Reddy, C. J., speaking for the Division Bench, referred to the observations of the Supreme Court in *Chinnathayi* v. *Pandiya Naicker*[1], "general words of a release do not mean release of rights other than those then put up and have to be limited to the circumstances which were in the contemplation of the parties when it was executed" and was of the view that if, on the date of release of maintenance right, the right under the provisions of the Hindu Women's Rights to Property Act was not in contemplation, the earlier release would not be a bar to a claim under the Act. No exception can be taken, as we consider, to that approach.

3. But there are two reasons which weigh with us in not accepting the appellant's contention. What has happened in this case, on facts is this. The family settlement resulted in a division not only of the joint family but also of the joint family properties. The joint family originally consisted of the husband, his son by the first wife, the second wife and his two sons by her. There was a separation by the document, the husband and his son by the first wife remaining as one unit of the joint Hindu family with certain properties allotted to the unit and the second wife and her two sons by him, as another unit of the joint family with certain other properties allotted to the second unit with a provision that they should live separatively. This Court has held that a widow, though not a coparcener, is a member of a Hindu joint family. But, in view of the family settlement just now referred to, we are inclined to think that she could no longer, after that settlement, be regarded as a part of the joint family consisting of the husband and his son by the first wife. In our view, sub-section (2) of section 3 of the Hindu Women's Rights to Property Act, 1937, can be applied only to an interest of her husband in the properties of a joint family of which the widow is a member. The whole intention of the document was to bring a separation of not only of the joint family to be split up into two units, as we mentioned, but to have the joint family properties, which originally belonged to the joint family, divided and allotted

1. (1964) 1 An.W.R. 231 : A.I.R. 1964 A. P. 380.

1. (1961) 3 S.C.R. 592 : A.I.R. 1962 S.C. 29.

separately to each of the units. To such a case, we think that sub-section (2) of section 3 cannot be applied.

4. The second ground is that, if the appellant by a literal reading and application of sub-section (2) of section 3 is allotted a share of her husb and in the Hindu joint family properties which belonged to the joint family consisting of the husband and his son by the first wife, the result would be to leave the division of the original joint family properties and allotment to the second unit completely undisturbed and deprive the son by the first wife of the benefit of a share in the entirety of the properties belonging to the family, as it existed before 24th December, 1930. It seems to us that that result was not under the contemplation of the Hindu Women's Rights to Property Act, 1937. In fact, the second ground we have mentioned derives validity from the first ground, namely, that the widow in order to enable her to claim her husband's interest should continue to be a member of such family.

5. Alagiriswami, J., no doubt, disposed of the appeal before him on a different ground. He says that the document dated 24th December, 1930 read as a whole disentitled the appellant to her claim. We agree with this aspect as well, more particularly because the document itself provides that neither of the units of the joint family brought about by it would have any claim personally or with regard to the properties allotted to one or other of the units. The first appellate Court has extracted the relevant passages from the document for this view and we hardly need to reiterate.

6. Though, therefore, we do not dissent from *Ranganayakamma* v. *Rajesaramma*[1], on the view we are inclined to take of the effect of sub-section (2) of section 3 of the Act and also the terms of the family settlement, the appeal, in our opinion, should fail. We would like to point out that in *Ranganayakamma* v. *Rajesaramma*[1], there was no splitting up of the joint family and the widow there continued to be a member of the joint family at the time she made the claim under section 3 of the Hindu Women's Rights to Property Act, 1937.

1. (1964) 1 An.W.R. 231 ; A.I.R. 1964 A. P. 380.

7. The appeal is dismissed. No costs.

S J. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*P.R. Gokulakrishnan, J.*

R. Essa .. *Petitioner**

v.

N. M. Jamal and Sons, represented by Nazir Noor Ali Jamal..*Respondent.*

Contempt proceedings—Second Appeal—Direction to appellant to deliver vacant possession of suit property within specified time—Court's order not obeyed—Suit for injunction by appellant against decree-holder —Interim relief granted—Appellant whether committed contempt.

In second appeal, one '*E*' was directed by the High Court to deliver vacant possession of suit property, to one '*J*' within three months. '*E*' did not obey the order. On the other hand '*E*' filed a suit for injunction in the City Civil Court to restrain '*J*' from executing the decree for possession and obtained interim relief. '*J*' filed an application in the High Court for contempt against '*E*'.

Held, (on the facts): There was a doubt as to whether '*E*' really intended to disobey the judgment and decree of the High Court or whether he had sought to establish his right of tenancy. In proceedings for contempt, the benefit of doubt has to be given to the respondent. [*Para* 15.]

Cases referred to:—

Ali Mohamad Adamalli v. *Emperor*, (1945) 2 M.L.J. 56 : 71 I.A. 226 : A.I.R. 1945 P.C. 147 ; *Ponnuswami Iyer* v. *Ganapathi Iyer*, (1923) 45 M.L.J. 742 : 81 I.C. 241 ; A.I.R. 1924 Mad. 393 : In re *Yegnanarayanaiah*, A.I.R. 1974 Mad. 313 : (1974) 1 M.L.J. 155 ; *Dwijendra Krishna* v. *Surendra Nath*, A.I.R. 1927 Cal. 548 ; *Ramalingam* v. *Mahalinga Nadar*, (1965) 2 M.L.J. 162: A.I.R. 1966 Mad. 21; *Abdul Razack* v. *Azizunnissa Begum*, I.L.R. (1969) 3 Mad. 174: A.I.R. 1970 Mad. 14.

* C.M.P. No. 9811 of 1974 in S.A. No. 431 of 1972. *24th December*, 1974.

Petition praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to punish the respondents herein for contempt of Court for disobeying the order of the High Court dated 2nd May, 1974 and passed in S.A. No. 431 of 1972 preferred to the High Court against the decree of the City Civil Court (Second Additional Judge) Madras, passed in A.S. No. 86 of 1970 (O.S. No. 3809 of 1966 on the file of the City Civil Court, (Fifth Assistant Judge, Madras).

N. Sivamani, for Petitioner.

K. Parasaran for *R. Tyagarajan*, for Respondent.

The Court made the following

ORDER.—This is an application filed by the respondent in S.A. No. 431 of 1972 for punishing the appellant therein for contempt of Court. It is alleged in the affidavit filed in support of the application that the respondent in the contempt application has committed contempt by disobeying the decree in S.A. No. 431 of 1972. The respondent, who is the appellant in S.A. No. 431 of 1972, was granted three months time to vacate and deliver possession of the suit property. The said order was passed on 2nd May, 1974. The respondent ought to have delivered possession of the property to the petitioner on or before 2nd August, 1974. But the respondent did not deliver possession of the property. Instead, the respondent filed a suit O.S. No. 5654 of 1974 on the file of the City Civil Court (VI Assistant) Madras, praying for a declaration that he is entitled to the property under the seventh defendant in the suit, Sri Sundareswara Devasthanam represented by its Executive Officer and for a consequential relief of injunction restraining the petitioner from executing the decree in O.S. No. 3809 of 1966. The respondent herein filed also an application for interim injunction in I.A. No. 15116 of 1974 in that suit for a temporary injunction, and has obtained an interim relief also According to the petitioner, the respondent is bound to deliver possession of the suit property as per the direction of this Court contained in the judgment in S.A No. 431 of 1972. The claim of the respondent as a tenant under the Devasthanam had been negatived by the Courts below and this Court also observed in S.A. No. 431 of 1972 that Exhibit A-11 shows that the respondent is not a tenant under the Devasthanam. Hence, according to the petitioner, the respondent is estopped from setting up the same case once over. To substantiate the case of contempt, the petitioner has alleged that the respondent has deliberately flouted the directions of this Court by not delivering the property to the petitioner on or before 2nd August, 1974 and also by approaching the City Civil Court for an injunction restraining the petitioner from executing the decree in O.S. No. 3809 of 1966, out of which S A. No. 431 of 1972 arose. This attitude and act of the respondent, according to the petitioner amounts to clear contempt.

2. The respondent filed a counter stating that there is neither a prohibitory nor a mandatory order of this Court to entitle the petitioner to move for contempt. When a decree is passed by a Court for possession and time is granted to the judgment debtor, its effect is only to stay the execution of the decree for the period covered by the order of the Court. Further in O.S. No. 3809 of 1966 the landlord of the premises in question was not a party. The respondent further alleged that he entered into a direct tenancy with the landlord, *viz.*, Sri Sundareswarar Devasthanam represented by its Executive Officer in respect of the demised premises and in view of that tenancy there was nothing left for the petitioner to enforce as against the respondent in relation to the demised premises. O.S. No. 5654 of 1974 on the file of the City Civil Court, Madras has been filed by the respondent against the petitioner, defendants 1 to 5 in the prior suit O.S. No. 3809 of 1966 and the landlord, for a declaration that the respondent is entitled to continue in possession of the demised premises, *viz.*, No. 315/318, N.S.C. Bose Road, Madras-1, as the tenant of the Devasthanam and for a consequent injunction restraining the petitioner from executing the decree in O.S. No. 3809 of 1966 against the respondent, as the latter had become ineffective and also for a declaration that the respondent is entitled to the benefit of the Tamil Nadu Buildings (Lease and Rent Control) Act.

In the said suit, the respondent had also filed I.A. No. 15116 of 1974 and an interim injunction had also been granted in favour of the respondent. The respondent thus states that in view of the change of circumstances enabling him to claim the benefits of the Tamil Nadu Buildings (Lease and Rent Control) Act, and also in view of the fact that his present claim and right are outside the scope of the previous proceedings, he is entitled to continue in possession of the said demised premises and that he has not committed any contempt of the order of this Court, nor has he disobeyed any orders of this Court.

3. Before dealing with the question of contempt, it is better to state, in brief, the facts which culminated in S.A. No. 431 of 1972. The sixth defendant in O.S. No. 3809 of 1966 was the apellant in S.A. No. 431 of 1972. He is the respondent in this contempt application also. He contended in O.S. No. 3809 of 1966, *inter alia*, that he was in possession of the suit premises, that the leasehold right belonged to him, that he has taken receipts for rent paid to the landlord and that as such the plaintiff in the suit could not claim any relief against him. The trial Court decreed the suit as prayed for except for the relief claimed relating to payment of Rs. 501 per month from the date of suit till the dissolution of partnership. On appeal before the Second Additional City Civil Judge by the respondent and the seventh-defendant in the suit, the lower appellate Court dismissed the suit as against the seventh defendant but confirmed the decree and judgment of the trial Court in so far as the respondent was concerned. Aggrieved by the Judgment and decree of the lower appellate Court, the respondent preferred S.A. No. 431 of 1972. This Court, in the said second appeal, observed that both the Courts below had elaborately discussed the evidence on record and had concurrently come to the conclusion that there was no independent tenancy created between the respondent herein and the Devasthanam and that the fact that the respondent had not replied to the plaintiff's notice Exhibit A-11 showed that he was not a tenant directly under the Devasthanam. With these observations, this Court held that the plaintiff had to succeed in getting possession of the suit property and ultimately confirmed the decree of the Court below as regards possession in favour of the petitioner. Three months' time to vacate and deliver possession was granted by this Court. This was only at the request made by the appellant in S.A. No. 431 of 1972.

4. Thus it is clearly seen from the facts narrated above, that the contention of the respondent that the has become directly a tenant under he Devasthanam, which he has put forth on the previous occasions, had been negatived and the prayer for possession made by the petitioner was granted even as against the respondent. The respondent, taking advantage of the fact that the Devasthanam, the landlord, was not a party to the piror suit O.S. No. 3809 of 1966 has filed O.S. No. 5654 of 1974 in the City Civil Court for a declaration that he is entitled to be in possession of the suit property as tenant under Sri Sundareswarar Devasthanam and for a consequential relief of injunction restraining the petitioner from executing the decree in O.S. No. 3809 of 1966. There is also a prayer therein for a declaration that the respondent, in any event, is entitled to the benefits of the Tamil Nadu Buildings (Lease and Rent Control) Act and without seeking an order of eviction under the provisions of the said Act, the petitioner cannot evict the respondent.

5. In O.S. No. 5654 of 1974, the respondent, *inter alia*, alleged that subsequent to the surrendering of tenancy rights to the partnership firm known as "*Jafros*" consisting of defendants 1 to 6 to the action, and after that partnership firm took over the premises and the business, there was no subsisting tenancy of the suit premises in favour of the petitioner in his individual capacity, that the partnership firm having become a tenant of the shop subsequently in 1968 assigned all the tenancy rights to the respondent, that the Devasthanam, the seventh defendant in the action, has recognised the respondent as its tenant, that the respondent has ever since been paying the rent to the Devasthanam directly and occupying the premises, carrying on his own business 'N.M. Jamal and Sons', now known as 'Hilton Footware', that the Devasthanam (seventh defendant)

was not a party to O.S. No. 3809 of 1966 and that since the Devasthanam was not a party to O.S. No. 3809 of 1966, the tenancy which came into effect during the pendency of the suit O.S. No. 3809 of 1966, the same will not be hit by any decision rendered in O.S. No. 3809 of 1966. It is further alleged by the respondent in that suit that he is enjoying the building in his own individual right as a tenant under the Devasthanam and that the decree for possession obtained by the petitioner has become inexecutable. On the above allegations, he prayed in O.S. No. 5654 of 1974 for the reliefs as already set forth by me.

6. An interim injunction has also been obtained from the VI Assistant Judge, City Civil Court, by the respondent restraining the petitioner from executing the decree in his favour.

7. Thiru Sivamani, learned counsel appearing for the petitioner while narrating the above facts, submitted that there has been a wilful disobedience of the order of this Court in S. A. No. 431 of 1972 on the part of the respondent and as such he has committed contempt.

8. Thiru Parasaran, learned counsel appearing for the respondent, submitted that the respondent, even now, *bona fide* believes that his right of tenancy got from the Devasthanam is independent of the proceedings culminating in S.A. No. 431 of 1972 and as such it cannot be said that there is wilful disobedience on the part of the respondent. The learned counsel further submitted that the petitioner cannot have the right to file a contempt application while he has the remedy by was of execution of the decree, in O.S. No. 3809 of 1966. He further submitted that the suit O.S. No. 5654 of 1974 is pending before the City Civil Court and an interim injunction has also been obtained and as such the petitioner can well contest that suit and the injunction application on merits on the facts which he alleges now and have his remedy in that suit itself.

9. Thiru Sivamani, learned counsel for the petitioner, replied that the allegation in the plaint in O.S. No. 5654 of 1974 as if the respondent has become a tenant under the Devasthanam had not been whispered in the proceedings, in O.S. No. 3809 of 1966 either before the Courts below or in S.A. No. 431 of 1972. There is a clear finding by the Courts below and the High Court in S.A. No. 431 of 1972 that the respondent was not a tenant directly under the Devasthanam, that Exhibits A-5 and A-18 in those proceedings strengthened the case of the petitioner as to his right to be in possession of the property and that the petitioner is entitled to have possession thereof. As such, according to the learned counsel, the respondent had the clear and wilful intention of disobeying the orders of this Court when he approached the City Civil Court and also by alleging in his suit certain facts.

10. It is clear from the facts that the finding is the respondent is not a tenant directly under the Devasthanam. This finding was given as late as 2nd May, 1974 in S.A. No. 431 of 1972, to which the respondent was a party. He could have substantiated his claim of independent tenancy under the Devasthanam either by adducing additional evidence or by bringing the fact of direct tenancy agreement between the Devasthanam and himself to the notice of either the lower appellate Court or to the High Court. From the allegations made in the plaint in O.S. No. 5654 of 1974, the respondent traces his tenancy under the Devasthanam and recognition of the tenancy by the Devasthanam from 1968 onwards. O.S. No. 3809 of 1966 out of which S.A. No. 431 of 1972 arose, was disposed of only on 16th January, 1969. If so, even during the pendency of that suit where the petitioner claimed possession of the property, the respondent seems to have got the tenancy from the Devasthanam. It is surprising as to what prevented him from substantiating his tenancy before the Courts below. Having kept quiet all these days, and having got adverse orders throughout up till the stage of the second appeal, as regards possession of the property, the respondent has thought fit to come forward with O.S. No. 5654 of 1974 with the allegation that the Devasthanam was not a party to the previous proceedings and that he has become a tenant under the Devasthanam.

11. Contempt proceedings are very delicate matters. Contempt matters being in the nature of quasi-criminal proceedings, the benefit of doubt definitely accrues to the contemner. The respondent has taken shelter by instituting civil action on the allegation as if he is a tenant under the Devasthanam. In support of his contention that the respondent should be punished for contempt, Thiru Sivamani cited the decision in *Ali Mohamed Adamalli* v. *Emperor*[1]. That was a case which arose out of a direction made by the Chief Judge, Court of Small Causes, Bombay, under section 6-A of the Musslaman Wakf (Bombay Amendment) Act, 1935, directing accounts to be furnished within a limited time. The party disobeyed the said direction. A Bench of the Bombay High Court in proceedings taken out against the party for contempt convicted the party by directing him to pay a fine. The same was confirmed by the Privy Council. Section 6-A (1) of the Mussalman Wakf Act as amended by the Mussalman Wakf (Bombay Amendment) Act, 1935, states:—

> "Notwithstanding anything contained in section 3 it shall be competent to the Court, on failure of a mutawalli to furnish a statement as required under the said section, to require the mutawalli to furnish, within such time as the Court shall fix, a statement containing all or any of the particulars referred to in the said section....".

As per the said section, the Chief Judge Court of Small Causes, Bombay had directed the mutawalli to file the accounts. Beaumont, C.J., in the Bench Judgment of the Bombay High Court said :—

> "The (party) has refused and still refuses, to obey the order. His contention is that the order was wrong, because the property in respect of which it was made is not wakf property. But if that was his contention, he could have filed a suit in the High Court for a declaration to that effect, and applied for a stay of the order of the Small Cause Court. He did not do that and the order has been in force, and has been disobeyed for over two years. He also says that he understood from the direction to prosecute in default of compliance with the order, that that was the only penalty which he would incur. We have, however, offered him further time in which to comply with the order, but he says, through his counsel, quite definitely, that he does not intend to comply with the order",

and committed the party for contempt. As far as the present case is concerned, there is no such direction nor any direction by virtue of any provision of any enactment. The respondent has also filed a suit and has obtained an interim injunction. If there were to be any direction, the matter would have come directly under section 2 (*b*) of the Contempt of Courts Act, 1971, which states :—

> "Civil contempt means wilful disobedience to any judgment, decree, direction, order, writ or other process of a Court or wilful breach of an undertaking given to a Court".

In the present case, except giving time to the respondent to vacate and deliver possession, there is no direction as such given to him. Hence I am of the view that the facts of the Privy Council case are completely different from those in the present case and as such the decision cannot givern the present case.

12. Thiru Sivamani also cited the decision in *Ponnuswami Iyer* v. *Ganapathi Iyer*[1], wherein it is pointed out that the Magistrate was bound to obey the order of the High Court notwithstanding that there was no formal communication thereof to him from the High Court. On the facts of that case, it was held that the Magistrate was not guilty of contempt because it was not made out that in acting as he did he wilfully disobeyed the order of the High Court. I do not think that the decision can apply to the case on hand.

13. In re *B. Yegnanarayaniah*,[2] states that where a Court directs a party to produce

1. 72 I.A. 226 : (1945) 2 M.L.J. 56 : A.I.R. 1945 P.C. 147.

1. (1923) 45 M.L.J. 742 : 81 I.C. 241 : A.I.R. 1924 Mad. 393.
2. (1974) 1 M.L.J. 155 : A.I.R. 1974 Mad. 313.

a particular deed, but it is not proved that the document is in the custody of the party so directed, his failure to produce it cannot be regarded as wilful and he cannot be convicted of contempt. This decision has no relevance to the case on hand.

14. The decisions in *Dwijendra Krishna* v. *Surendra Nath*[1], *Ramalingam* v. *Mahalinga Nadar*[2], and *Abdul Razack* v. *Azizunnissa Begum*[3], can be easily distinguished. As a matter of fact, in *Ramalingam* v. *Mahalinga Nadar*[2], it has been clearly held that it is inexpedient to invoke and exercise contempt jurisdiction, in essence, as a mode of executing the decree or merely because other remedies may take time or are more circumlocutory in character.

15. The case-law noticed above, generally deals with 'contempt' in given cases. In this case, we are concerned with the question whether there is any wilful disobedience on the part of the respondent in respect of the judgment, decree or direction given by this Court in the second appeal. The decree in the second appeal, is only executable, though three months' time has been given for vacating the property. There is no specific direction by the Court or undertaking given by the respondent. No doubt, the respondent has filed a suit and obtained an interim injunction alleging that he is a tenant under the Devasthanam. The defendant has thus resorted to a civil Court under a belief, which, he says, is *bona fide*, that he has obtained a right from the Devasthanam to be a tenant direct. Since the civil Court is seized of the case, it will be a very delicate matter to express any opinion as to the correctness of the respondent's act in filing the suit. The petitioner has ample remedy to put forth all the facts in the suit filed by the respondent to establish his case. In view of the fact that the respondent has approached the civil Court to establish his right as if he is a direct tenant under the Devasthanam, it cannot be construed that he has wilfully disobeyed the judgment and decree of this Court in S.A. No. 431 of 1972 and thus rendered himself to be punished for contempt. Some more strong proof is needed. There is a doubt as to whether the respondent really intended to disobey the judgment and decree of this Court or whether he has sought to establish his right of tenancy directly under the Devasthanam. In proceedings of contempt, the benefit of doubt has to be given only to the respondent. In thoese circumstances, I am of the view that the petitioner has not established beyond all reasonable doubt the contempt alleged by him against the respondent.

16. Giving the benefit of doubt to the respondent, I dismiss the contempt application and make no order as to costs.

S.J. ——— *Application dismissed*

1. A.I.R. 1927 Cal. 548.
2. (1965) 2 M.L.J. 162 : A.I.R. 1966 Mad. 21.
3. I.L.R. (1969) 3 Mad. 174 : A.I.R. 1970 Mad. 14.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M. M. Ismail, J.*

Binny Limited .. *Appellant**

v.

C.C. Thomas .. *Respondent.*

Natural Justice—Domestic Enquiry—Charges relating to certain sums of money—Non-production of cash book—Company's employee not given copy of report and judgment of enquiry officer—List of witnesses announced—Examination of two persons not in the list—No opportunity of cross-examination by employee—Dismissal of employee—Enquiry whether legal and regular—Principles of natural justice—Whether violated.

The non-production of the company's cash book during a domestic enquiry against an employee of the company relating to certain sums of money amounts to preventing the employee from establishing his innocence and constitutes denial of an opportunity to put forward his case. Where at the domestic enquiry the employee had put forward a defence, the employee is entitled to know how his defence had been considered and rejected

*A.S. No. 458 of 1971. 6*th March,* 1975.

before it was found that the charges framed against him were proved. Where the employee was not given a copy of the judgment of the enquiry officer and he came to know of it only when it was marked in the Court during the course of trial of the suit it would clearly constitute violation of the principles of natural justice. [*Paras* 5, 6 *and* 7.]

When witnesses are suddenly produced and examined, by one side the other side will be at a disadvantage in cross-examining such witnesses and particularly so in a domestic enquiry. Hence the other side must have previous information as to who would be examined so that the cross-examination of such witnesses may be effective. [*Para.* 8].

Where the termination of the services of an employee is in the nature of a termination *simpliciter*, without being preceded by a domestic enquiry into the alleged misconduct of the employee and without the termination being based on the said enquiry, the order is not vitiated. If, on the other hand, when a person is dismissed on the basis of a domestic enquiry held against him into certain alleged misconduct held to be proved the position will be entirely different. In the former case there will be no stigma attached to the employee concerned and in the other case a stigma will be attached to the employee concerned which may have the effect of preventing him from seeking employment elsewhere.

[*Para.* 12].

The employee in the instant case claimed only five month's salary, and though he called it arrears of salary and allowance, still in effect it represents damages for wrongful dismissal, and five months salary is proper damages.

Cases referred to:—

Lakh Raj Khurana v. Union of India, (1971) 1 S.C.W.R. 459 : (1971) 1 S.C.C. 780 : (1971) Lab I.C. 1240 : A.I.R. 1971 S.C. 2111 ; *Percy Edward Warne* v. *Quchterlosy Valley Estate* (1958) *Ltd.*. (1956) 1 L.L.J. 526 : I.L.R. (1956) Mad. 933 : (1956) 1 M.L.J. 556 : A.I.R. 1956 Mad. 505.

Appeal against the judgment in O.S. No. 5625 of 1957 in the file of the City Civil Court, Madras.

King and Patridge, for Appellant.

P. Anandan Nair and *P.N. George*, for Respondent.

The Court delivered the following

JUDGMENT :—The defendant in O.S. No. 5625 of 1967 on the file of the City Civil Court, Madras, is the appellant herein. The respondent herein at the relevant time was working as Assistant Engineer in the Shipping Section, (Madras Harbour) of the appellant herein. Certain charges were framed against the respondent by the appellant and those charges have been set out in the following terms in paragraph 20 of the judgment, which alone was brought to my notice during the hearing of this appeal, as follows :

> 'The gravamen of the charge found in Exhibit B-13 may be divided into four categories as shown hereunder: (1) the first is that the plaintiff received Rs. 2,450 from Southern Shipping Corporation on or about 27th April, 1967, Rs. 240 on 22nd May, 1967 from Chettinad Cement Corporation, and failed to deposit the said amounts, thereby caused loss to the defendant company; (2) that he failed to ensure that the said amounts were remitted to the head office and thereby he was negligent in his duty; (3) that he received the following amounts on the following dates :

Amount	*Date*	*Parties*	*Retained till*
Rs. 3,820	14—3—1967	Southern Shipping Corporation	27—4—67
Rs. 720	14—3—1967	—do—	12—4—1967
Rs. 3,559	23—12—1966	Kathina T.H. Agencies International Clearing and Shipping Agents	4—1—1967
Rs. 5,562	25—4—1967	S.S. Marthon Victory	8—5—1967,

and thus unauthorisedly retained these amounts for the aforesaid periods and thus committed misappropriation, (4) that the plaintiff deliberately and intentionally gave a false statement to the Chief Executive Officer that he received the sum of Rs. 2,450 only on 19th May, 1967 whereas in fact he had received it as early as 25th April, 1967. "

An enquiry was conducted into the said charges by D.W. 1 and ultimately by an order dated 19th September, 1967 marked as Exhibit B-34, the respondent was dismissed from the appellant-company's service with effect from the date of that order. The respondent filed the present suit claiming a declaration that the dismissal of the respondent from the service of the appellant was wrongful, illegal and irregular and praying for a decree directing the appellant to pay the respondent a sum of Rs.8,210 with future interest. The sum of Rs. 8,210 comprises of five months salary amounting to Rs.7,655 at the rate of Rs.1,531 per month and a sum of Rs. 555 being the refund of annuity deposit deducted from his salary from April, 1967 to June, 1967. The case of the respondent was that the charges framed against him were not proved and that the enquiry was vitiated and invalid. A written statement was filed by the appellant herein disputing the claim of the respondent and the details thereof are reflected in the following issues framed for trial by the learned trial Judge :

(1) Whether the suit as framed for recovery of salary and allowances after the dismissal of the plaintiff from service is maintainable in law ?

(2) Whether the suit is not maintainable for the reason that the plaintiff should have claimed the benefits of Pension Fund and Provident Fund as a consequential relief to the declaration sought for ?

(3) Whether the order of dismissal is invalid for the reason that it was under the signature of one of the Directors of the defendant-company ?

(4) Whether the domestic enquiry and disciplinary proceedings conducted by the defendant is vitiated as being opposed to the principles of natural justice or as being irregular ?

(5) Whether the plaintiff is guilty of any or all of the acts of misconduct with which he was charged ?

(6) Whether the plaintiff is entitled to a declaration that the dismissal of the plaintiff from the service of the defendant was wrongful and illegal ?

(7) Whether the plaintiff is entitled to the sum of Rs. 8,270 or any other sum ?

2. The learned VII Assistant Judge, City Civil Court, Madras, by judgment and decree dated 4th August, 1970 found the material issues in favour of the respondent and decreed the suit as prayed for. It is against this judgment and decree that the present appeal has been filed by the defendant.

3. Mr. S. Ramasubramanian appearing for the appellant very elaborately argued this appeal before me. The learned counsel contended that the finding of the learned trial Judge that the charges were not proved against the respondent herein was beyond the jurisdiction of the civil Court, since the civil Court had no jurisdiction to go into the correctness or otherwise of a finding, arrived at a domestic enquiry. In order to sustain this contention, the learned counsel took me through the relevant paragraphs of the judgment. Since I uphold the judgment and decree of the trial Court on another point with reference to which the appellant has practically no answer, I do not propose to consider the validity or otherwise of this submission. In paragraph 26 of the judgment which in effect deals with issue No. 4, the learned trial Judge has come to the conclusion that the domestic enquiry conducted by the appellant was in illegal violation of the principles of natural justice and was illegal and irregular and that therefore the respondent was entitled to the declaration that the order of dismissal passed against him was ineffective and inoperative. The facts which will sustain this conclusion of the learned trial Judge are as follows :

4. D.W. 1 was the person who conducted the enquiry. There was a charge by the respondent that the said D.W. 1 functioned both as Judge and Prosecutor, because it was he who framed and put questions to the witnesses and recorded the answers

given by them. Admittedly there was no other officer on behalf of the appellant who examined the witnesses and it was only D.W. 1, who examined the witnesses and recorded the evidence. I am not going to rest my conclusion even on that.

5. More serious are certain matters which I propose to refer to now by way of upholding the judgment of the trial Court. Throughout it was the case of the respondent, with regard to the charges framed against him, that he handed over the money to one Mr. Andrews, who was a checker, on the very same day he received the money, that Mr. Andrews paid the told the respondent that he (Mr. Andrews) had remitted the money to the Head Office, that in token of his having paid the money to Mr. Andrews and Mr. Andrews having received the money, an entry was made in the cash book and that the said cash book was not made available during the domestic enquiry. In more than one place the respondent in his evidence as P.W. 1 has referred to this fact, namely, that the said cash book was the company's cash book, that it was not the private book of Mr. Andrews and that yet the company had not chosen to produce that book at the time of the enquiry. There was no cross-examination whatever of P.W. 1 on that question. The result of that will be that the said cash book was the company's cash book and yet it was not produced during the domestic enquiry, thus preventing the respondent from establishing his innocence and that consequently it would constitute denial of an opportunity to the respondent to put forward his case.

6. Secondly, D.W. 1 had prepared a report in which he had stated, that he had analysed and discussed the evidence given by him during the time of the enquiry. Admittedly no copy of such report was given to the respondent before the Court. As a matter of fact D.W. 1 admitted that the said report was not produced before the Court. Mr. Ramasubramanian could not deny the position that if a domestic enquiry had been conducted in which an employee had put forward a defence, the employee was entitled to know how his defence had been considered and rejected, before it was found that the charges framed against him were proved.

7. Thirdly, on the basis of the report of the Enquiry Officer, D.W. 1, the Director of the Company, who passed the order dismissing the respondent from service as per Exhibit B-34, appears to have written a judgment marked as Exhibit B-35 on the same date. As a matter of fact, Exhibit B-34 refers to that judgment having been pronounced on that date. But it is admitted that no copy of that judgment was given to the respondent herein and the learned counsel for the respondent points out that the respondent became aware of the judgment only when it was marked in the Court during the course of the trial of the suit in question. There can be no doubt whatever that this again constitutes violation of principles of natural justice.

8. Fourthly, Exhibit B-19 is a communication dated 7th August, 1967 sent to the respondent herein by the Director of the company. That communication sets out the names of six persons and states:

"The witnesses who will be examined at the enquiry will be selected from among the following persons :

Mr. M. G. Kamat, Chief Executive, B.E.W., Ltd.,

Mr. P. U. Cariappa, Asst. Engineer, B.E.W., Ltd.,

Mr. P. Mohanasundaram, Cashier, Binny & Co., Ltd.,

Mr. P. Somasundaram, Cashier B.E.W., Ltd.,

Mr. P.K. Raman of Southern Shipping Corporation.

Mr. P.S. Ramachandran of Southern Shipping Corporation.

If any other witness is examined during the enquiry, you will be given sufficient time to cross-examine the witnesses."

It is admitted that the enquiry was conducted on two days, that is, on 16th and 17th August, 1967. Two persons whose names did not find a place in the list of witnesses, Exhibit B-19, had been examin-

ed during the enquiry. One was Mr. Andrews and the other was one Mr. Venkateswaran. As a matter of fact, it is represented that the said Mr. Venkateswaran was examined in the place of Mr. P.S. Ramachandran, who figured in the list of witnesses contained in Exhibit B-19. It is admitted that no advance notice of the proposal to examine these two witnesses was given to the respondent. Equally it is admitted that when these witnesses were examined or after they were examined, the Enquiry Officer did not tell the respondent that those witnesses were persons not included in the original list contained in Exhibit B-19 and that therefore it was open to the respondent to take time to cross-examine them, if he wanted. As a matter of fact, when witnesses are suddenly produced and examined, the other side will be at a disadvantage in cross-examining such witnesses and particularly so in a domestic enquiry. Hence, the other side must have previous information as to who would be examined so that the cross-examination of such witnesses may be effective. In this particular case, notwithstanding the assurance given in Exhibit B-19 that sufficient time for cross-examination would be given, if witnesses not included in the list were examined the respondent was not told about it at the same time and he did not have any such effective opportunity to cross-examine the two witnesses. Mr. Ramasubramanian, learned counsel for the appellant contends that there is nothing to show that the respondent asked for any such opportunity or protested against the same. On the other hand Exhibit B-23, copy of the proceedings shows that on 17th August, 1967 itself, namely, the second day of enquiry the respondent protested against calling Mr. Venkateswaran and Mr. Andrews as witnesses, because their names were not included in the letter dated 7th August, 1967 addressed to him.

9. Mr. Ramasubramanian in this context contended that the failure to give sufficient time to cross-examine these witnesses had not prejudiced the respondent in any manner. I am unable to accept this argument. The case of the respondent throughout was that he handed over the moneys to Mr. Andrews then and there and Mr. Andrews told the respondent that he remitted the moneys to the Head Office. Consequently, the examination of Mr. Andrews without giving an opportunity to the respondent, to cross-examine him certainly has prejudiced the respondent. Equally Mr. Venkateswaran has spoken to his having paid certain amounts to the respondent on specified dates which, according to the respondent, from the beginning was not true and the case of the respondent was that he received the amounts only later. As a matter of fact, with regard to the amount of Rs.2,450 the case of the respondent was that he received the same only on 19th May, 1967 though he signed the receipt on 25th April, 1967. Consequently the evidence of Mr. Venkateswaran that he paid money to the respondent on 25th April, 1967 itself was prejudicial to the case of the respondent and therefore the respondent should have been given an effective opportunity to cross-examine Mr. Venkateswaran.

10. In my opinion, the above features will clearly go to show that there has been violation of the principles of the natural justice with regard to the conduct of the enquiry and therefore the resultant order is vitiated. Consequently, the learned trial Judge is right in holding that the order was ineffective and invalid.

11. However Mr. Ramasubramanian drew my attention to the judgment of the Supreme Court in *Lakh Raj Khurana* v. *Union of India*[1], and contended that in the case of master and servant, there is no scope for the application of principles of natural justice. The only sentence on which reliance has been placed in this behalf occurring in the said judgment is as follows:

> "As regards the applicability of the rule of natural justice it has not been shown to us how under the general law of master and servant, in the absence of any protection conferred by Article 311 of the Constitution such a rule can be invoked."

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1. (1971) 1 S.C.W.R. 459 : (1971) 1 S.C.C. 780 : (1971) Lab. I.C. 1240 : A.I.R. 1971 S.C. 2111.

I am unable to agree that this observation has any application to the facts of this case. Once a domestic enquiry is conducted that enquiry has to be fair and proper and one of the requirements which that enquiry should comply with is the Principles of natural justice. The decision of the Supreme Court referred to above has not dealt with this question at all and the above sentence occurring in the judgment torn out of context cannot be relied upon to contend that in any domestic enquiry conducted by a master against his servant alleging misconduct against him, the enquiry need not comply with the requirements of principles of natural justice.

12. Mr. Ramasubramanian then contended that even if the order of dismissal is held to be illegal or inoperative or ineffective, the quantum of damages to which the respondent would be entitled by way of damages for wrongful dismissal will be only three month's notice pay which has been provided for in the contract between the parties. I have already referred to the fact that the respondent claimed only five months' salary, and though he called it arrears of salary and allowance, still in effect it represents damages for wrongful dismissal. He himself would have retired from service on 1st January, 1968 and consequently he claimed salary only for five months. I am unable to hold that the said five months salary does not represent the proper damages for wrongful dismissal. With regard to this case also, Mr. Ramasubramanian relied on a judgment of this Court in *Percy Edward Warne* v. *Quchterlosy Valley Estate* (1958), *Ltd.*[1], holding that where a contract of employment provides for terminating the employment by three months' notice at the perfect discretion of either party and a person is wrongfully dismissed, the damages which he would be entitled to would only be the pay and allowance due for the notice period and nothing more. I am unable to hold that this decision applies to the facts of this case. The position may be different where the services of an employee are terminated, which termination is in the nature of a termination *simpliciter* without being preceded by a domestic enquiry into the alleged misconduct of the employee and the termination not being based on the said enquiry. On the other hand, when a person is dismissed on the basis of a domestic enquiry held against him into certain alleged misconduct which had been proved, the position will be entirely different. In one case threre will be no stigma attached to the employee concerned and in the other case a stigma will be attached to the employee concerned which may have the effect of preventing him from seeking employment elsewhere. Consequently the rule enunciated in the above decision cannot apply to a case where the employee is dismissed on the basis of a finding arrived at as a result of an enquiry conducted into an alleged misconduct against him. It is admitted that the decision of this Court referred to above did not deal with a case where the employee was dismissed on the basis of being found guilty of misconduct at a domestic enquiry held against him.

13. No other point was urged before us.

14. Under these circumstances, the appeal fails and is dismissed with costs.

R.S. ——— *Appeal dismissed.*

1. (1956) 1 L.L.R. 526: I.L.R. (1956) Mad. 993 : (1956) 1 M.L.J. 556 ; A.I.R. 1956 Mad 505.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*C.J.R. Paul, J.*

Muthu Karuppan Chettiar

... *Appellant*—(Plaintiff).*

v.

1. **Chinnaponnu Ammal**, 2. **Ammuni Ammal**, 3. **Parmasivam**, 4. **Mahamuni (Minor)**, 5. **Ravi (Minor)**, 6. **Murugesan (Minor)**, 7. **Indrani (Minor)**, **(Minor respondents 4 to 7 by mother and guardian Ammuni Ammal—2nd Respondent).**

Respondents (*Nil*).

(*Cause title accepted as per order of Deputy Registrar, dated* 15*th July*, 1974 *on affidavit*).

Civil Procedure Code (*V of* 1908), *Order* 40, *rule* 1—*Execution Petition—Receiver appointed by Court—Harvested and sold the crops—Sale proceeds not put intoCourt—Receiver died—Fresh Execution Petition—Whether maintainable—Remedy of the decree-holder. Receiver—Not an agent of the decree-holder or the judgment debtor—Officer of Court.*

The receiver appointed by the Court under the provisions of the Civil Procedure Code, Order 40, Rule 1 is an office of the Court and is not an agent of the party at whose instance he was appointed. Therefore where the receiver received the money realised by the sale of the harvested produce, he acted not as an agent of the decree-holder or the judgment-debtor at whose instance he might have been so appointed, but as an officer of the Court and the money becomes one in *custodia legis*. But if the money which ought to have been put into Court has not been put into Court by the receiver and the receiver has died, the question arises as to how the question of imputation of the loss should be decided. To saddle the judgment-creditor with the responsibility for the loss merely because he took out the application for the appointment of the receiver to take charge of the crops, would be inequitable. Likewise, the position of the judgment-debtor also requires sympathetic consideration. His crops had been taken possession of by the officer appointed by the Court and he had been deprived of the value of the crops and in those circumstances, it will be certaintly inequitable to order his properties to be attached once again and sold for realisation of the amount. In these circumstances the executing Court should have, under the powers vested in it by reason of Order 40, rule 1, Code of Civil Procedure, issued a notice to the heirs of the receiver and held an enquiry as contemplated under the rule and taken all steps to realise the amount, if any, the receiver had collected by the sale of crops but had not deposited into Court. [*Para*. 3.]

*A.A.A.O. No. 103 of 1974. *7th March*, 1975.

Cases referred to:—

Orr v. *Muthia Chetty*, (1894) I.L.R. 17 Mad. 502; *Muthiah Chetti* v. *Orr*, (1897) I.L.R. 20 Mad. 224; *Collector of Tiruchirapalli* v.*Trinity Bank Ltd.*, (1961) 2 M L.J. 398: I.L.R. (1961) Mad. 1158 : 44 I.T.R. 189 : 74 L.W. 502: A.I.R. 1962 Mad. 9 (F.B.).

Appeal against the order of the District Court, Tiruchirapalli, dated 27th November 1973, and made in C.M.A. No. 175/73 (E.P. No. 1250/72 in O.S. No. 1850/70, D.M.C., Tiruchirapalli).

K. Chandra Mouli, for Appellant.

R. Srinivasan, for Respondents.

The Court made the following

ORDER:—This second appeal arises in the following circumstances. The appellant filed an execution petition before the learned District Munsif of Tiruchirapalli under Order 21, Rule 66 of the Code of Civil Procedure for the realisation of the amounts due under the decree by attachment and sale of the respondent's property. The amount claimed in the execution petition was Rs. 2,220-05P. The respondent (judgment-debtor) contended that the execution petition was not at all maintainable inasmuch as, in the prior execution petition, *viz.*, E.P. No. 126 of 1972, the valuable plantain crops raised by him on an extent of 78 cents had been attached and put in

the possession of a receiver appointed by the Court and the receiver had harvested the crop and sold the same, but had not put the sale proceeds into Court, but died after that, and in those circumstances, the decree-holder had to proceed only against the heirs of the receiver for realisation of the amount, and not by attaching his properties once again and bringing them to sale. The learned District Munsif overruled that objection of the judgment-debtor and proceeded with the execution. The learned District Judge of Tiruchirapalli, however, disagreed with the learned District Munsif and held that as far as the judgment-debtor was concerned, the value of the harvested crops had left his hands towards the satisfaction of the decree obtained by the judgment-creditor and if the judgment-creditor had not been paid the value of the crops, it was a matter between him and the officer appointed by the Court and the judgment-debtor cannot be held liable for it. He has further observed that possession of the property having been taken away from the judgment-debtor, he cannot be proceeded against simply on the ground that the property, for reasons beyond the control of the judgment-debtor, did not reach the decree-holder. He therefore held that a fresh execution petition for realisation of the decree amount without taking into account the property that had been taken away from the hands of the judgment-debtor in the earlier petition was not maintainable.

2. From the records, it does not appear whether the receiver who was appointed by the Court to harvest the crops, sell the same and deposit the sale-proceeds into Court, did actually sell the same and for what amount he had sold those crops. All that is evident from the records is that the receiver took charge of the crops and subsequently he did not send a report to the Court or deposit any sale proceeds in regard to the crops taken possession of by him, but kept on asking for time to submit such a report and eventually he died without submitting a report and without depositing any money, with the result, both the judgment-debtor as well as the judgment-creditor have been put into trouble and the judgment-creditor was constrained to file an execution petition for realising the amount due to him under the decree since he had not been able to realise the amount due under the decree. The judgment-debtor is also put to difficulties because his crops had been taken possession of by the receiver and he has been deprived of those crops which were the means by which the decree could have been satisfied. A similar situation arose in *Orr* v. *Muthia Chetti*[1] There, a receiver appointed at the instance of the judgment-creditor under section 503 of the old Code of Civil Procedure misappropriated the moneys collected by him by the sale of the harvest of certain villages which harvest had been attached in execution of a decree. The receiver had collected a sum of Rs. 845-2-7. But, instead of remitting the amount into Court, he misappropriated it to his own use, and when criminal proceedings were instituted against him he absconded and was still absconding at the time when the matter came up before this Court. The decree-holder then applied for execution against the judgment-debtor in respect of the balance due under the decree, but the latter resisted the execution proceedings by contending that the decree must be taken to have been satisfied to the extent of the sum of money misappropriated by the receiver. That contention was, however, negatived by the Courts below. Muttuswami Ayyar, J., while considering the question whether, in cases in which a receiver appointed at the instance of the judgment-creditor under section 503 of the old Code of Civil Procedure misappropriated his collections, the decree ought to be treated as satisfied *pro tanto* on the ground that he is the agent of the judgment-creditor on whose application he was appointed, observed that for any loss arising from his default the receiver is certainly responsible, but when he cannot be proceeded against, the question as between innocent parties is, who ought to bear the loss which is imputable to neither, and the only answer is, that it must devolve on the estate to which the appointment relates. Muttuswami Ayyar, J., further observed that there was also another reason in support of that view, that moneys in the hands

1. (1894) I.L.R. 17. Mad. 502.

of the receiver belong to the Court which appointed him, and are in *custodia legis* and the receiver cannot spend them except under the orders of the Court and if they are lost whilst in custody of the receiver, it cannot be denied that the loss must devolve on the estate, for the loss is not imputable to his default or that of any other and that the Courts below, in that case, were in error in introducing a theory of agency. Against the judgment of Muttuswami Ayyar, J. a Letters Patent appeal was filed and since the two Judges who heard the appeal differed, the matter was referred to a Full Bench, in *Muthiah Chetti* v. *Orr*[1] But, the Full Bench was deprived of an opportunity of considering the legal question involved, since the appellant, not being represented, did not appear before the Full Bench and his appeal was dismissed with costs. The Judgment of Muttuswami Ayyar, J., therefore stands.

3. Undoubtedly, the receiver appointed by the Court under the provisions of Order 40, Rule 1 of the Code of Civil Procedure is an Officer of the Court and is not the agent of the party at whose instance he was appointed. This has been the consistent view taken by all the Courts and if any decision is required in support of that proposition, there is the one in *Collector of Tiruchirapalli* v. *Trinity Bank Ltd.*[2] Therefore, the receiver received the money realised by the sale of the harvested produce, not as an agent of the decree-holder or the judgment-debtor at whose instance he might have been so appointed, but as an officer of the Court and the money becomes one in *custodia legis*. But, if the money which ought to have been put into Court has not been put into Court by the receiver as in this case, and, as in this case, the receiver has died, the question arises as to how the question of imputation of the loss should be decided. To saddle the judgment-creditor with the responsibility for the loss merely because he took out the application for the appointment of the receiver to take charge of the crops, would be inequitable. Likewise, the position of the judgment-debtor also requires sympathetic consideration. His crops had been taken possession of by the officer appointed by the Court and he has been deprived of the value of the crop and in those circumstances, it will be certainly inequitable to order his properties to be attached once again and sold for realisation of the amount. In this case, in the circumstances, the executing Court should have, under the powers vested in it by reason of Order 40, rule 4 of the Code of Civil Procedure, issued a notice to the heirs of the receiver and held an enquiry as contemplated under that rule and taken all steps to realise the amount, if any, the receiver had collected by the sale of the crops but had not deposited into Court. The executing Court has not done so, but merely ordered execution to proceed against the judgment-debtor for the realisation of the amount due under the decree. Therefore, in the circumstances, I set aside the order passed by both the Courts below and remand the matter back to the executing Court for holding such an enquiry as is contemplated by Order 40, Rule 4 of the Code of Civil Procedure, after giving due notice to the heirs of the receiver and if it is ascertained in that enquiry that the receiver had sold the crops and realised the sale-proceeds and had failed to deposit the same into Court, to take such steps as may be found necessary to realise that amount from the estate of the late receiver in the hands of his legal heirs and if any amount is realised as a result of such steps being taken to credit the same towards the satisfaction of the decree and allow execution to proceed for the balance, if such sale-proceeds fall short of the amount due under the decree. But, if after such steps having been taken, the amount is found to be unrealisable from the estate of the late receiver in the hands of his legal heirs, the executing Court can proceed against the judgment-debtor for realisation of the amount due under the decree. The second appeal is allowed and ordered accordingly. There will be no order as to costs. No leave.

R.S. —— *Appeal allowed.*

1. (1897) (I.L.R.) 20 Mad. 224.
2. (1961) 2 M.L.J. 398: I.L.R. (1961) Mad. 1158: 44 I.T.R. 189: 74 L.W. 502: A.I.R. 1962 Mad. 59 (F.B).

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:—*T. Ramaprasada Rao and S. Ratnavelpandian, JJ.*

Muthu Bhattar .. *Appellant**

v.

D. Chokku Bhattar and others .. *Respondents.*

Hindu Succession Act (XXX *of* 1956) *section* 14—*Joint family—Widow of member—Pre*-1937 *widow—Occupation of family house in virtue of right of residence—Claim of maintenance in addition to residence—Decree—Maintenance right acquired before Act* (XXX *of* 1956)—*Effect of Act coming into force—Will by the widow bequeathing the property to relation—Whether valid.*

A maintenance right acquired by a Hindu female always enured for her life. The legislature included this in the *Explanation* to section 14 (1) of Act (XXX of 1956 deliberately so as to expand that right and to make it an absolute right in the female concerned after the commencement of the Hindu Succession Act. [*Para.* 9.]

Applying the decision in *Lakshmi Ammal* v. *Sappantmuthu Nadar* (Second Appeal No. 1415 of 1965) to the facts and circumstances of the present case, the property given to the widow who had no pre-existing right to a share in the property, without any express terms limiting her estate in the property, would become her absolute property under section 14 (1). [*Para.* 12.]

Cases referred to:—

Ramanadan v. *Rangammal*, (1889) 12 I.L.R. Mad. 260; *Bayapparaju* v. *Lakshmamma*, A.I.R. 1937 Mad. 193; *Eramma* v. *Veerupana*, (1966) 2 S.C.R. 626: (1967) 1 S.C.J. 745: A.I.R. 1966 S.C. 1879; *Raj Singh* v. *Hastimal*, A.I.R. 1972 Raj. 191; *Mangal Singh* v. *Rattno*, (1968) 1 S.C.J. 487: (1967) 3 S.C.R. 454: A.I.R. 1967 S.C. 1786; *Santhanam Kachapalaya Gurukkal* v. *Subramania Gurukkal*, (1974) 87 L.W. 202; *Chellammal* v. *Nallammal*, (1971) 1 M.L.J. 439; *Lakshmi Ammal* v. *Sappantumuthu Nadar*, S.A. No 1415 of 1965; *Rangammal* v. *Muthuraja*, (1970) 2 M.L.J. 620: *Dharma Udayar* v. *Ramachandra Mudaliar*, (1968) 81 L.W. 399.

*A. No. 29 of 1968. *7th March* 1975.

Appeal against the decree of the Court of the Subordniate Judge, Madurai, dated 30th December 1966, in Original Suit No. 151 of 1965.

S. Sitarama Iyer and *S. Rajaram Iyer*, for Appellant.

R. Gopalaswamy Iyengar, for Respondent.

The Judgment of the Court was delivered by

Ramaprasada Rao, J. :—The unsuccessful plaintiff in O.S. No. 151 of 1965 on the file of the learned Principal Subordinate Judge of Madurai is the appellant. The dispute is about the right which one of the widows of a joint family acquired in relation to one of the properties of the family. Chinnasami Bhattar had five sons. Three amongst them died issueless. The other two sons were Subbu Bhattar and Chocku Bhattar. Subbu Bhattar died leaving behind him his son Chinnaswami Bhattar, who, in turn, died on 31st December, 1937, leaving behind him his widow Ammani Ammal. The other son Chokku Bhattar died in 1935 leaving behind him Subbammal as his widow. Ammani Ammal died on 22nd February, 1945, after having taken the plaintiff in adoption. Subbammal, however, lived till 3rd September, 1965. Subammal was therefore admittedly a pre-1937 widow in the sense that she became widow prior to the passing of the Hindu Women's Right to Property Act of 1937. In 1940, she filed the suit O.S. No 202 of 1940 on the file of the District Munsif of Madurai, seeking for her accredited maintenance rights. It is common ground that in the pleadings in that suit Subbammal stated that she was living in one of the family houses and in consequence thereof, she claimed a sum of Rs. 75, on account of her maintenance. She however made it clear that she was in occupation of the above immovable

property belonging to the joint family and that she was claming in that suit the additional money claim which was in addition to her right to reside in the family house which was also under her occupation under an arrangement with the other members of the joint family and that right of occupation coupled with the decree sought for in money for her living and existence would be in full quit and satisfaction of her claim to mintenance as against the other members of the family. The learned District Munsif referred to this fact and observed that Subbammal was not claiming any independent relief in respect of her right to residence and that the money sought for for other purposes of her living may be computed independent of such right of residence which she was already enjoying as above. The learned District Munsif also said that, in addition to the residence in regard to which no relief was claimed in the plaint and as to which no provision was made in the judgment, the plaintiff Subbammal would be entitled to a sum of Rs. 15 per month on account of her maintenance after the date of the judgment. This judgment and decree of the Co rt-below which went up in appeal was confirmed excepting to the extent that the quantum of maintenance granted was increased by Rs. 5. After the said judgment was so rendered by a competent Court, Subbammal continued to reside in the property which is the subject-matter of this suit and, as already stated, lived till 3rd September, 1965, which is posterior in point of time to the date of the induction of the Hindu Succession Act, 1956. Consequently, under the provisions contained in the Hindu Succession Act of 1956 and in the view that her limited interest which was a qualified interest in the property in which she was residing and which she acquired in lieu of maintenance enlarged itself into an absolute estate, Subbammal executed a registered will (Exhibit B-57) bequeathing the property in favour of defendants 1 and 2 who are her near relations. It is also not in dispute that defendants 1 and 2 continued in possession of the suit property by virtue of the testament after the death of Subbammal. Whilst matters stood thus, the plaintiff, soon after the death of Subbammal, filed the present action for a declaration of his title to the suit property as the immediate reversioner of Subbammal and sought for a permanent injunction restraining the defendants from interfering with his alleged possession of the suit property or, in the alternative, for possession with mesne profits.

2. The defendants in their written statement, after having referred to the relevant facts which led to Subbammal executing the testament in question maintained that at no time, the plaintiff was in possession of the suit property and, therefore, was not entitled to the preventive injunction against them. On the other prayer of the plaintiff that he should be declared as the owner of the suit property and entitled to possession thereof, the defence was that the plaintiff did have no manner of right, title or interest in it and that by virtue of Exhibit B-57 they were entitled to the suit property in their own right and in consequence, they were entitled to be in possession of the same without being disturbed by the alleged claim or right projected by the plaintiff.

3. On the above relevant pleadings, the following issues were framed:—

1. Whether the plaintiff has title to the suit house?

2. Whether the plaintiff is in possession of the suit house to warrant the relief of injunction against the defendants?

3. Whether Subbammal became entitled absolutely to the suit house by reason of the Hindu Succession Act, 1956?

4. Whether the will dated 27th December 1957 of Subbammal is true, valid, and binding on the plaintiff having been executed by her, when she was in a sound disposing state of mind?

5. Whether defendants 1 and 2 have acquired right to the suit house under the said will?

6. Whether the suit has not been properly valued and correct Court-fee has not been paid?

7. To what relief, if any, is the plaintiff entitled?

The following additional issues were also framed:—

8. What is the market value of the suit property?

9. To what future mesne profits is the plaintiff entitled, if any?

4. On issues 6 and 8, the learned Subordinate Judge held that, as the suit has been properly valued in the course of trial and as proper Court-fee has been paid, the issues need not be answered one way or the other. On issue 2, he held that the plaintiff was never in possession of the suit house and, therefore, not entitled to the relief of injunction as prayed for. On issue Nos. 1 and 3 which are the material issues which arose for consideration before him, he held that by reason of section 14 (i) of the Hindu Succession Act and in the facts and circumstances of this case, Subbammal became a fresh stock of descent under the Act and she having died not intestate, had absolute title to the suit property and that she had in consequence the incidental right and capacity to deal with it in any manner she desired. The learned Subordinate Judge considered the import of the judgment of the learned District Munsif referred to earlier and found that the right acquired by the plaintiff in that suit, *viz.*, Subbammal in or about 1940 as was seen from the recitals in the pleadings in that suit and as was obvious from the facts disclosed during its trial was a right which she acquired to the suit property in lieu of her maintenence, that she was in possession of the same on the date when the Hindu Succession Act, 1956, came into force and that the charge created by the decree as regards the secured payment of the money decree passed therein would not in any way alter the situation. On issue Nos. 4 and 5, he held that Exhibit B-57 was executed by Subbammal whilst she had the necessary testamentary capacity to do so and that the will has been proved in solemn form in accordance with the law and that, therefore, the defendants 1 and 2 could base their claim on Exhibit B-57. He was also of the view that there were no suspicious circumstances surrounding the execution of the will and that Subbammal had the *jus disponendi* not only to write the will, but also to dispose of the property which is the subject-matter of the testament as she purported to do. Ultimately, he upheld the title of defendants 1 and 2 to the suit property and therefore dismissed the suit of the plaintiff. It is as against this, the present appeal has been filed.

5. The learned counsel for the appellant reiterated the contentions raised in the lower Court. Mr. S. Sitarama Iyer would seriously contend that the contents of section 14(1) of the Hindu Succession Act, literally taken, give the impression that in order to enlarge the nature of a property held by a Hindu pre-1937 widow, it is necessary that the character of title which such lady had at or about the time when Act XXX of 1956 was introduced should be in the nature of a widow's estate or as is popularly known as a limited estate under the orthodox Hindu Law and Subbammal not having had such an interest at or about the time when the Hindu Succession Act was introduced, her right, whatever may be the nature of it, cannot be deemed to have been enlarged by reason of section 14(1) of the Act. He would also state that, though under the explanation, the property acquired by a female Hindu in lieu of maintenance or arrears of maintenance would also be property within the meaning of section 14(1), yet, according to him, the nature of title and right which a female heir could be said to have possessed or owned in relation to that property in question not being equatable to that of a widow's estate and not being equivalent to the right of a limited owner, it cannot be said that there has been an automatic expansion of that right into full ownership. It is also said that by a reading of the judgment of the learned District Munsif in the original suit referred to above, the right could only be said to be a right of residence as is commonly known and not any other right known to jurisprudence. But, on the other hand, Mr. R.Gopalaswami Iyengar, learned counsel for the respondents, would say that the language of the Explanation, read in conjunction with the purport of section 14(1), gives the undoubted impression that any property possessed by a female Hindu in lieu of maintenance or arrears of maintenance

shall be held by her as the full owner thereof, if only two conditions are satisfied; firstly, she should have been in possession of the property on the date of the commencement of the Act and, secondly, there must be cogent proof that that property came into her possession by virtue of an unqualified arrangement as regards her maintenance as a widow of the joint family. Once these two conditions are satisfied, then the statutory provision is attracted on its own force and the result is that there is an automatic enlargement of the estate of the female Hindu into full ownership thereof.

6. Though a number of decisions has been cited by both the sides, the question whether a property possessed by a female Hindu whether acquired before or after the commencement of the Act in connection with her maintenance rights or arrears of maintenance should be held by her as full owner thereof after the Hindu Succession Act came into force is not free from doubt. There is, of course, a pronouncement of Ramanujam, J., in Second Appeal No. 1203 of 1973 and that of Ramaswami, J., in S.A No. 1558 of 1971 both of which probably squarely govern the issue. But the other decisions cited by the learned counsel for the appellant in particular would cover cases where the maintenance grant is subject to an instrument, decree, order of Court or a document prescribing a restricted estate in such a property in relation to the maintenance-holder. As such a contingency such as the grant of a maintenance right with a contemporaneous restriction attached to it is governed by section 14 (2) of the Act, such decisions cited by the learned counsel for the appellant may not be apposite for the situation. We shall, however, consider the import of such decisions.

7. Before doing so, it is necessary to understand as to what is a maintenance right. The components of maintenance understood both in civil and criminal law are many and varied. *Inter alia* it contains the right to claim food, attire and shelter. These and other ingredients of the right of maintenance are to be consolidated and not to be treated disjunctively. In the case of the right of maintenance of a Hindu female or a Hindu widow, until the passing of the Hind Adoptions and Maintenance Act, 1956, this was governed by the personal law of the parties. A peculiar situation, however, is always demonstrable with reference to the pre-1937 widows. In the case of such widows of female members, when a maintenance right is recognised either by the act of parties or by an involuntary measure, such as a decree of Court, then that right so secured by the Hindu female has to be understood with reference to the fact and circumstances under which the grant was made. But, as was stated by a Full Bench of our Court in *Ramanadan* v. *Rangammal*[1].

> "The correct view is that the obligation to maintain the mother is strengthened by giving her an interest in immovable property and thereby enabling her to constitute that interest into a specific charge, or an actual existing proprietary interest for the term of her life, and to protect her right of maintenance against improvident alienation of the fund from which it is to be satisfied. *To this extent, the right of maintenance is a right* in re *or an interest in ancestral property.*" (The underlining is ours).

The right to maintenance of a Hindu female is not a bare personal right to enjoy the property for life. It is in this context, we should understand the decree and judgment which the learned District Munsif passed in favour of Subbammal in O.S. No 202 of 1940 as early as 1949. We have already excerpted the relevant portions. The learned District Munsif in uncanny terms observed:—

> "In addition to residence in regard to which no relief is claimed in the plaint and as to which no provision is made in the judgment or decree in this suit, the plaintiff is entitled to be paid Rs. 25/."

There was, therefore, a conscious application of the mind of the Court as well as the parties before it when the maintenance

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1. (1889) 12 I.L.R. Mad. 260 at 268.

right to which Subbammal was entitled to as a member of the joint family was reckoned and quantified. There was absolutely no doubt that the possession of the property which is the suit property was in her own right as maintenance-holder of the family and that such possession was not attributable to any act of trespass or illegality on the part of Subbammal. In exercise of a right, however, restricted it may be and however small may be its content, Subbammal was in possession of the suit property in lieu of hermaintenance. As we said, the facets of maintenance are varied in nature and one such accepted ingredient of maintenance is the right of residence. It is therefore fairly clear, that when the decree for maintenance was passed in 1940, the various components of maintenance, such as shelter, food and clothing, were taken into consideration and as Subbammal was already having her residence in one of the family properties the other components of the maintenance right were reckoned in terms of money and the decree was rendered by the learned District Munsif. In fact that this is the position is not disputed by the plaintiff himself The plaintiff, when he instituted the suit, interpreted the scope of O.S. No. 202 of 1940 on the file of the District Munsif, Madurai, and averred in the present action as follows:—

> 'Subbammal has clearly stated that in lieu of her right of residence, she was occupying the aforesaid house.'

As the right of residence is one of the limbs of the right to claim maintenance, it cannot be said that as and from the time when Subbammal possessed the property in question and was in occupation of it, she did not acquire that property in lieu of maintenance. As was stated by Venkataramana Rao, J., in *Bayapparaju* v. *Lakshmamma*[1] the right of a female member to reside in the family dwelling house as well as her right of maintenance is based upon her husband's right to share in the family property.

8. It would be convenient at this stage to refer to the relevant provisions in the Hindu Succession Act which are apposite for our discussion.

> "14 (1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner
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> *Explanation*:—In this sub-section, "property" includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as *Stridhana* immediately before the commencement of this Act.
>
> (2) Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil Court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property."

In the orthodox Hindu Law, a widow's estate was understood in a peculiar way having regard to the *sastric* edicts which generally govern the ownership and the treatment of such estate of widows. Very early, the Privy Council recognised that even though the estate held by a widow is what is legally and popularly understood as widow's estate, even then for justifiable necessity and for other causes she had the power to alienate the same. There were, therefore certain particular rights which were attached to and incidental to a widow's estate. Such widow's estate, which was later on by usage described as limited ownership, was also understood and interpreted in the same light. The concept of limited ownership or widow's estate (if they are interchangeable at all) projected a particular circumstance whereby the limited owner could alienate the property for necessity, etc. But in the case of property acquired by a female Hindu either before or after the commencement of the Act in lieu of maintenance or arrears of maintenance which obviously enures for her life cannot be the subject-mater of any alienation at all. The distinguishing

1. A.I.R. 1937 Mad. 193.

feature compartmentalises the two estates, namely, the woman's estate or a limited estate and an estate or property acquired by a female Hindu in lieu of maintenance. Whilst the latter could never be the subject-matter of any alienation even for necessity, the former could be. In this context, the words deployed in section 14 (1) "shall be held by her as full owner thereof and not as a limited owner" should be interpreted. In our view, the words 'limited owner' appearing in the latter part of section 14 (1) are more positive expatiation of the situation and they have therefore no impact upon the concept in the orthodox Hindu Law which deals with limited ownership or widow's estate. In any event, the argument of the learned counsel that the words 'limited owner' used in section 14 (1) of the Act should be understood in that light and a Hindu female acquiring property in lieu of maintenance should also be placed in that plane of limited owners or females owning widow's estate is not acceptable to us. No doubt, the learned counsel has referred to certain decisions which we shall presently refer to and as in the opinion of the Supreme Court the position is not that canvassed for by the learned counsel for the appellant, we are unable to subscribe to that view. Each case has to be decided on its own merits and it is therefore necessary to study the basis and the hypothesis under which the particular Hindu female obtained the property in lieu of maintenance and if under the circumstances of a particular case such acquisition included a right to possess immovable property in lieu of maintenance and if such possession continued till the commencement of Act XXX of 1956 and continued thereafter, then such an inchoate right enlarges itself into an absolute right by virtue of the text of Section 14 (1).

8. We shall now consider the citations made by the counsel at the bar. Before referring to the various cases referred to by the learned counsel for the appellant, we may immediately refer to the treatment of the subject by the Supreme Court in *Eramma* v. *Veerupana*[1]. The Supreme Court said:

"The property possessed by a female Hindu, as contemplated in the section, is clearly property to which she has acquired *some kind of title* whether before or after the commencement of the Act. It may be noticed that the *Explanation* to Section 14 (1) sets out the various modes of acquisition of the property by a female Hindu and indicates that the section applies only to property to which the female Hindu has acquired *some kind of title, however, restricted the nature of her interest may be.* The words "as full owner thereof and not as a limited owner" as given in the last portion of sub-section (1) of Section 14 clearly suggest that the legislature intended that the limited ownership of a Hindu female should be changed into full ownership. In other words, Section 14 (1) of the Act contemplates that a Hindu female who, in the absence of this provision, would have been a limited owner of the property, will now become full owner of the same by virtue of this section; the object of the section is to extinguish the estate called 'limited estate' or 'widow's estate' in Hindu Law and to make her a Hindu woman, who under the old law would have been only a limited owner, a full owner of the property with all powers of disposition and to make estate heritable by her own heirs and not revertible to the heirs of the last male holder."

9. The learned counsel for the appellant very strongly relies upon the latter part of the passage as excerpted above and would vehemently contend that what was intended by the Act as interpreted by the Supreme Court was that unless the female heir had in her what was called a 'limited estate' or 'widow's estate', there cannot be any expansion or absolution of such estate by virtue of the *Explanation*. It should not be forgotten that the case in *Eramma* v. *Veerupana*,[1] referred to above was not dealing with a case of maintenance. But, the earlier part of the quotation cited above, in our view, makes it very clear that the property possessed by a female Hindu as contemplated in this section read with the

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1. (1966) 2 S.C.R. 626 : (1967) 1 S.C.J. 746: A.I.R. 1966 S.C. 1879.

1. (1967) 1 S.C.J. 746: A.I.R. 1966 S.C. 1879.

Explanation to Section 14 (1) is clearly the property to which she has acquired some kind of title. The Supreme Court, with the greatest respect to the learned Judges, has very rightly placed the accent on 'some kind of title, however, restricted the nature of her interest may be', it therefore, follows that such title, however inchoate or restricted it may be', is enlarged by reason of the operation of the statutory provisions and such enlargement is automatic. The words 'limited estate' or 'widow's estate' used by the Supreme Court in the above judgment, no doubt, refer to the facts of that case. But, as they have laid down categorically that even a restricted title to the property, which sprang from the application of the provisions of section 14 (1) of the Hindu Succession Act, would automatically expand itself into an absolute right, it is this proposition which applies to the facts of this case Subbammal acquired the property in lieu of maintenance. That is not even seriously disputed before us. Then it follows that the Hindu Succession Act made a particular departure from the accredited norms of the personal law of Hindus by including that imperfect restricted title in property acquired by a Hindu female in lieu of her maintenance as a right which should be enlarged by reason of Section 14 (1). This is a specific departure from the personal law as well as the common law. A maintenance right acquired by a Hindu female always enures for her life. The legislature was conscious of it. But they included this in the *explanation* to Section 14 (1) deliberately so as to expand that right and to make it an absolute right in the female concerned after the commencement of the Hindu Succession Act. We are, therefore, unable to agree with the learned counsel for the appellant that unless the prior estate held by the female is either a limited estate or a widow's estate within the meaning of the orthodox Hindu law, there cannot be an automatic enlargement of that estate by reason of Act XXX of 1956.

10. We have already referred to the fact that a maintenance right is a right *in re* vide *Ramanadan* v. *Rangammal*[1]. This right which is inchoate in a female Hindu is attributable to her status as a female member of the family. It is undoubtedly therefore a right and if that right has an impinge or impact on immovable property in the sense that while granting such maintenance to a Hindu female certain rights in immovable property are also created, it follows axiomatically that she has acquired a right in the property in lieu of her maintenance. Such a right, therefore, has to be dealt with under section 14 (1) and so viewed, Subbammal's right over the suit property has enlarged after the induction of Section 14 (1) of the Hindu Succession Act.

11. The next question to be considered is whether Subbammal had barely a right of residence over the property or she was having that right which is contemplated in Section 14(1). There is absolutely no basis for the contention that Subbammal was residing in the suit property only because she was granted a right of residence. In *Raj Singh* v. *Hastimal*[1] relied upon by the learned counsel for the appellant, a bare right of residence was granted to the female Hindu. In that context, the learned Judge said that the words "acquire" occurring in section 14 is important, and that the person who has only a right of residence in the property cannot be said to have acquired the property. There cannot be a dispute over this proposition. But the Supreme Court in *Mangal Singh* v. *Rattno*,[2] observed as follows —

> "The expression used in section 14(1) of the Act was intended to cover cases of possession in law also, where lands may have descended to a female Hindu and she has not actually entered into them. It would of course, cover the other cases of actual or constructive possession. On the language of section 14(1), therefore, this provision will become applicable to any property which is owned by a female Hindu, even though she is not in actual, physical or constructive possession of that property".

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1. (1889) I.L.R. 12 Mad. 260 of 268.

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1. A.I.R. 1972 Raj. 191.
2. (1968) 1 S.C.J 487: (1967) 3 S.C.R. 454 : A.I.R. 1967 S.C. 1786.

It, therefore, follows that Section 14(1) takes into its fold juridical possession also. But in the case under consideration, it was physical possession which Subbammal had in the property, ever since the decree for maintenance was granted and she died possessed of it on the date when the Act came into force. It is in this context we have to refer to the judgment of Ramanujam, J., in S. A. No. 1203 of 1973. In that case, there was originally a controversy as to whether the property acquired by the female Hindu there, was by virtue of a partition or a grant. The case of the plaintiff in that case was that the suit items were given to the widow in lieu of maintenance somewhere in 1937 without any right of alienation and on condition that the property should revert to the heirs of the last full owner. But, this was however controverted later. This controversy as regards the origin of title of the female owner in that case probably was the basic cause for the decision of the learned Judge. In one portion of the judgment, the learned Judge said that:

> " in view of the *Explanation* the property given to Nevvi (the widow) in lieu of her claim for maintenance will also be property contemplated by section 14(1)".

Relying upon the observations of the Supreme Court in *Eramma* v. *Veerupana*,[1] already referred to above and in particular reference to the expatiation of the object of the legislature referred to by the Supreme Court in that decision, the learned Judge was inclined to take the view that unless the estate held by the female owner was a limited one or a widow's estate in Hindu Law, there could not be any enlargement of it, notwithstanding the provisions of Section 14 (1). With great respect to the learned Judge, we are unable to agree and we have already given the reasons. The Supreme Court in the above case, in our view, laid down in unequivocal terms the proposition that any kind of right secured by a female Hindu which resulted in the acquisition of rights over property by her and which continued in her possession on the date of commencement of Act XXX of 1956 would automatically be enlarged by reason of the norm and principle contained in Section 14(1). This observation of the Supreme Court however was not squarely referred to by the learned Judge.

1a. *Santhanam Kachapalaya Gurukkal* v. *Subramania Gurukkal*[1] relied upon by Ramanujam, J. was a case where the widow trespassed into the property and she had no vestige of title or right in it. It is obvious, therefore, that she did not acquire any right over the property in a manner known to law for such right to be enlarged by reason of the operation of Section 14(1). In the said case, the learned Judges have no doubt referred to the fact that the widow therein did not have any pre-existing title to the property. But in the facts and circumstances of that case, as the widow did not have any title or right over the immovable property at all, then it could not be comprehended how such a non-existent right could have expanded in any sense whatsoever and much less in the sense contemplated under Section 14 (1). Ramanujam, J., also referred to the decision in *Chellammal* v. *Nallammal*[2]. There, the learned Judges correctly laid down the proposition that maintenance grants in each case have to be understood with reference to the facts and circumstances of each case. In the light of the facts disclosed in that case, they were of the view that there was no enlargement. But the decision of Natesan, J., in *Lakshmi Ammal* v. *Sappanimuthu Nadar*[3] was quoted with approval by the Division Bench in *Chellammal* v. *Nallammal*[2]. Natesan, J. in S.A. No. 1415 of 1965 *inter alia* states:—

> "Now under Section 14(1), read with the *Explanation*, a land given to a female Hindu who has no pre-existing right to a share in the property, without any express terms limiting her estate in the land, would become her absolute property."

We approve of this statement of Natesan, J. Adopting this and applying the same to

1. (1967) 1 S.C.J. 746 : A.I.R. 1966 S.C. 1879.

1. (1974) 87 L.W. 202.
2. (1971) I M.L.J. 439.
3. S. A. No. 1415 of 1965.

the facts and circumstances of our case, the property given to Subbammal who had no pre-existing right to a share in the property, without any express terms limiting her estate in the property, would become her absolute property under section 14(1). It is not contended that under the decree of Court or by any other arrangement, the mode of enjoyment of the right to possess the property was in any way curtailed or limited. It would appear to us that Subbammal got possession of this property in lieu of her maintenance without any restriction or limitation attached to the enjoyment of that property and she continued in possession of the property till Act XXX of 1956 came and therefore, in our view, there is an automatic expansion of her qualified interest in the property into an absolute interest.

13. The decision in *Rangammal* v. *Muthuraja*[1] has also no application to the facts of this case. Therein it was held that mere possession was not sufficient to attract section 14 (1). That is also admitted to be not a case of maintenance grant. Presumably on the ground that possession of the female owner of the properties was neither juridical, positive or constructive, the learned Judges were of the view that there was no enlargement of the estate. But these are not the facts in the instant case. The case reported in *Dharma Uadyar* v. *Ramachandra Mudaliar*[2] is a case where under the maintenance grant, a property was given to a female with a specific direction that she should enjoy it for her life and that it should revert back to the persons named under the grant. This case, therefore, has no application as Section 14 (2) would cover the same.

14. We have already referred to the fact that the Supreme Court in *Eramma* v. *Veerupana*[3] has made the position very clear. When the Supreme Court referred to the object of the section, they were probably referring to it with reference to the facts of that case and we are of the view that having regard to the principles and the ratio therein, it cannot be said automatically and generally that it is only a limited estate of a female which would enlarge itself into absolute estate and not other estates. We have pointed out a distinction between the limited estate or a widow's estate and the estate, if one such expression could be used, which a female acquires in lieu of her maintenance. The former could be the subject-matter of an alienation and the latter cannot be. There are very many facets of distinction between the two estates. The legislature has included the right covered by the latter under Section 14 (1). To this extent, there has been a specific departure from the application or invocation of the personal law of the parties. Undoubtedly, a maintenance right acquired by a female would enure for her life. The Parliament was conscious of it. But yet they made it clear that if such right had an impact on immovable property and if, as a result of the vesting of such a right in a female, she acquired the property in lieu of maintenance and continued to be in possession of it till the commencement of the Act and thereafter, then it would be her absolute property.

15. The only other question that remains for consideration is whether Exhibit B-67 which was a registered will propounded by Subbammal creating a vested interest in defendants 1 and 2 is valid. A hesitant argument was addressed by the learned counsel for the appellant that the will has not been properly proved. The will is a registered will. D.W.3 was the attestor of the will. D.W.2 who was the Advocate's clerk came and deposed that the will was prepared under instructions from Subbammal and that his master drafted the will after having advised her that by reason of the Hindu Succession Act, she became an absolute owner of the property and she had, therefore, the capacity to execute the will in the manner she desired. Nothing is said about D. Ws. 2 and 3 excepting a bare suggestion that the draft said to have been prepared has not been produced. Whatever may be the force of that contention, in cases where an unregistered will is propounded for acceptance by a civil Court, that would not stand in a case where a registered will is brought into existence and that is the subject-matter of interpretation. We can fairly assume that in the case of

1. (1970) 2 M.L.J. 620.
2. (1968) 81 L.W. 399.
3. (1967) 1 S.C.J. 746: A.I.R. 1966 S.C. 1879.

a registered will, Subbammal had the requisite testamentary capacity, she went to the Registrar's office and got the will registered after having proved it before a public officer that the thumb-impression affixed to the will was hers, and so on. Besides the normal inference that registered wills have a greater force in the matter of prompting the Courts to accept and avoid any suspicion about it, in the instant case the attestor also has been examined and the learned Judge, after considering their evidence, found that the will was properly executed in due form and when Subbammal had the requisite testamentary capacity to do so. One other factor is that Subbammal lived for 8 years thereafter and there was no controversy about this will at all. We accept the findings of the trial Court that Subbammal executed the will voluntarily as a free agent, when she was in a sound disposing state of mind and Exhibit B-57 is a valid instrument binding on the plaintiff.

The appeal, therefore, fails and is dismissed. There will be no order as to costs.

S.J. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:— *T. Ramaprasada Rao and S. Rathnavelpandian, JJ.*

Panduranga Naicker .. *Appellant**

v.

Thirugnana Mudaliar and another .. *Respondents.*

Tamil Nadu Agriculturists Relief Act (IV of 1938), *as amended by Act (VIII of* 1973), *section 23-C—Application to set aside sale—Execution—Court sale —Application to set aside sale after* 90 *days but before confirmation—whether Within time—"Whichever is later"—Meaning of.*

If a person who is entitled to the benefits under the Act VIII of 1973 comes forward and seeks to set aside the sale or foreclosure of his property, then he has 90 days time to do so from the date of the publication of the Act in the local Gazette or from the date of confirmation of the sale, whichever is later. It is in this context that the expression "whichever is later" has to be understood. [*Para.* 6.]

Cases referred to:—

Sethurama Thevar v. *Kameetha Rowther*, (1953) 2 M.L.J. 742: A.I.R. 1954 Mad. 368.

Appeal against the order of the Court of the Subordinate Judge of Tiruvannamalai, dated 28th February, 1974 and made in C.M.A. No. 20 of 1973 (R.E.A Nil/73 in R.E.P. No. 518 of 1973 in O.S. No 421 of 1961 on the file of the District Munsif, Tiruvannamalai).

D. Raju, for Appellant.

T.R. Rajagopalan and *T.R. Rajaraman*, for Respondents.

The Judgment of the Court was delivered by

Ramaprasada Rao, J.—The appellant filed an application under section 23-C of Act IV of 1938 as amended by Madras Act VIII of 1973 to set aside a sale held on 17th January, 1973 in execution proceedings R.E.P. No 518 of 1973 in O.S. No 421 of 1961 on the file of the District Munsif's Court, Tiruvannamalai. The first respondent decree-holder contended that that application filed by the judgment-debtor was beyond time and was barred by limitation. The learned District Munsif, after referring to the relevant statutory provisions and after hearing the parties, rejected the application as out of time and the appeal in C.M.A. No. 20 of 1973 to the Court of the Subordinate Judge, Triuvannamalai was unsuccessful. A Civil Revision Petition was filed as against the order of rejection of the learned Subordinate Judge. Justice V. Ramaswami considered two questions which arose for consideration in the Civil Revision Petition. The first question related to the maintainability of the appeal against the order passed by the learned District Munsif and the second question was whether the application filed by the petitioner on 5th July, 1973 to set aside

*A.A A.O. No. 158 of 1974. 16*th April*, 1975.

the Court sale held on 17th January, 1973 was within or beyond time and not in accord with section 23-C of the Tamil Nadu Agriculturists Relief Act, 1938 as amended in 1973. The learned Judge felt that he was not inclined to accept the ratio in *Sethurnama Thevar* v. *Kameetha Rowther and others*[1] and was of the view that that decision required reconsideration and directed the Civil Revision Petition as originally filed, but now converted into a Civil Miscellaneous Second Appeal bearing No 158 of 1974 to be placed before a Division Bench

2. Mr. T.R. Ramachandran appearing for the respondents before us in his anxiety to support the orders of the Courts below referred to a few events which are necessary for us to set out before considering the law. It is common ground that the property of the petitioner as judgment-debtor was brought to sale and was purchased by the second respondent on 17th January, 1973. Before the sale could be confirmed, an amending Act VIII of 1973, which introduced section 23-C of the Act, came into force from 24th Jaunary, 1973. Thereafter on 5th June, 1973, the appellant filed an application to set aside the sale taking advantage of the liberalised provisions as regards the point of time during which an application to set aside a sale in the above circumstances could be made; in fact, even on the date when the application for setting aside the sale was filed, the sale was not confirmed. It is said that such confirmation of the sale took place on 21st June, 1973. Mr Ramachandran's contention is that the application is barred by time, as it has not been filed within 90 days from the date of the publication of the amended Act in the Tamil Nadu Government Gazette. On a reading of section 23-C it is said that the limit of 90 days provided for a litigant to file applications to set aside a sale are referrable only to sales which took place on or after the 1st March, 1972 and the sale has not been confirmed before the publication of the Act. As the present sale has not been confirmed before the publication of the said Act, it is seriously contended that the outer limit by which an application to set aside the sale could be made is 90 days from the date of the publication of the Act. If the application under consideration was filed within 90 days from 24th Jaunary, 1973, the learned counsel's contention is that it would be in time. But, as the application has been made on 5th June, 1973 which is beyond 90 days from 24th Jaunary, 1973, the application is beyond time. Reliance is placed upon the decision in *Sethurama Thevar* v. *Kameetha Rowther and others*[1] On the other hand, the learned counsel for the appellant would say that so long as the sale has not been confirmed, the aggrieved person has 90 days time to set aside such sales from the date of confirmation and as the present application has been filed even prior to the date of the confirmation, the application is in time. It is said that the outer limit as provided under the section in the matter of filing such application falls under two broad situations. Firstly, an application has to be filed within 90 days from the date of the publication of the Act in the local Gazette and secondly within 90 days from the date of the confirmation of the sale whichever is later. If, therefore, the confirmation has not taken place on the date when the application has been filed, the question as to the bar of limitation would not at all arise. V. Ramaswami, J., while referring the subject to a Division Bench has summarised the five situations which might arise under Section 23-C. Before detailing them, we shall refer to the section. It reads as follows:

> "23-C. *Power of Court to set aside sales of immovable property in certain cases*: Where in execution of any decree, any immovable property in which any person entitled to the benefits of the Tamil Nadu Agriculturists Relief (Amendment) Act, 1972, had an interest, has been sold or foreclosed on or after the 1st March 1972, and the sale has not been confirmed before the publication of the said Act in the *Tamil Nadu Government Gazette* or ninety days have not elapsed from the confirmation of the sale or from the foreclosure, at such publication, then, notwithstanding anything contained in the Limitation Act, 1963 (Central Act

1. (1953) 2 M.L.J. 742: A.I.R. 1954 Mad. 368.

1. (1953) 2 M.L.J. 742: A.I.R. 1954 Mad. 368.

XXXVI of 1963), or in the Code of Civil Procedure, 1908 (Central Act V of 1908) ; and not withstanding that the sale has been confirmed, any judgment-debtor claiming to be entitled to the benefits of the said Act, may apply to the Court within ninety days of such publication or of the confirmation of the sale, whichever is later, to set aside the sale or foreclosure of the property, and the Court shall, if satisfied that the applicant is a person entitled to the benefits of the said Act, order the sale or foreclosure to be set aside, and thereupon the sale or foreclosure shall be deemed not to have taken place at all:

Provided that no such order shall be made without notice to the decree-holder, the auction-purchaser, and other persons interested in such sale or foreclosure and without affording them an opportunity to be heard in the matter."

3. The five types of situations referred to be our learned brother are.—(1) no confirmation of the sale prior to the publication of the Act; (2) a confirmation of the sale prior to the publication of the Act and such confirmation was within three months of the Act; (3) confirmation of the sale prior to the publication of the Act, but more than three months prior to the publication; (4) a confirmation subsequent to the Act but within 90 days after such publication; and (5) a confirmation of the sale more than three months subsequent to the publication of the Act. The learned Judge, no doubt, has very carefully scanned the various situations that are inbuilt in the section itself. We are concerned however in this case with a sale which has been confirmed more than 3 months subsequent to the publication of the Act and with reference to an application filed by the judgment-debtor to set aside such a sale under section 23-C, but before the date of confirmation of the sale.

4. The first part of section 23-C refers to the event of sale and its non-confirmation before the publication of the Act and also to the situation when 90 days have not elapsed from the confirmation of the sale or from the foreclosure at such publication. These events, therefore, set down the hypothesis for the invocation of the rule of limitation provided for in section 23-C. After setting down the data for the invocation of the principal object for which the legislature has inserted the new section 23-C, the section itself provides thus:—

"then, notwithstanding anything contained in the Limitation Act, 1963 (Central Act XXXVI of 1963), or in the Code of Civil Procedure, 1908, (Central Act V of 1908), and notwithstanding that the sale has been confirmed, any judgment-debtor claiming to be entitled to the benefits of the said Act, may apply to the Court within 90 days of such publication or of the confirmation of the sale, whichever is later."

5. The term 'whichever is later' undoubtedly has reference to a point of time and not to a situation. Chandra Reddi, J. in *Sethurama Thevar* v. *Kameetha Rowther and others*[1] while considering a case though not *in pari materia* with the one under consideration before us had occasion to consider a similar provision, section 23-A of the earlier Act and observed :

'It looks to me that the expression 'whichever is later' means only 'whichever is the case."

6. We are unable, with great respect, to agree with this equation of the phrase 'whichever is later'. As we said, 'whichever is later' connotes a point of time and 'whichever is the case' obviously relates to a situation. Both connote two different aspects. As Justice V. Ramaswami said while referring the matter to a Division Bench :

"With great respect to the learned Judge, this interpretation seems to unduly narrow down the application of the benevolent provision contained in that section."

As Courts cannot declare the law, but only interpret it, such interpretation is

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1. (1953) 2 M.L.J. 742 : A.I.R. 1954 Mad. 368.

usually undetaken by Courts with reference to the object of the legislature. The main object of the legislature is to provide relief to the agriculturists. If a person who is entitled to the benefits under the Act comes forward and seeks to set aside the sale or foreclosure of his property, then he has 90 days time to do so from the date of the publication of the Act in the local Gazette or from the date of confirmation of the sale, whichever is later. It is in this context that the expression 'whichever is later' has to be understood. As this parenthesis prescribes a time or a period within which a relief could be asked for and which is assured by the State legislature under certain circumstances, it cannot be lightly denied by a narrow interpretation of the meaning of the words, which are clear and unambiguous, contained in a statutory provision. We are therefore of the view that the words 'whichever is later' which have an impact on time should be interpreted liberally and beneficially in favour of the agriculturists for whose sole benefit the legislation has been undertaken. We are unable to agree with Mr. T.R. Ramachandran that the word 'then' appearing as a conjunction between the earlier and the later parts of Section 23-C has a significance and that word taken in conjunction with the expression 'whichever is later' should be understood as meaning 'whichever is the case' as was said by Chandra Reddi, J. Again, this contention besides serving only a narrow interpretation of the Act, would only compel us to introduce certain provisions in between the lines of the section which would mean that we are not interpreting the law, but declaring the law. The Courts have no jurisdiction to do so. Even otherwise, it appears to us that the earlier portion of Section 23-C has a purpose to serve which is distinct and different from the purpose which the second part of Section 23-C serves. As all enabling provisions should not only be beneficially interpreted, but also be liberally considered, we are of the view that the term 'notwithstanding that the sale has been confirmed' appearing in the later part of Section 23-C would mean that the confirmation might be even after the date of the publication. So long as the application to set aside the sale is within 90 days from the date of such confirmation or within 90 days from the date of the Act whichever is later, hen such an application would not be barred. In the instant case, the sale was confirmed on 21st June, 1973. The petitioner, therefore, had 90 days time from 21st June, 1973 to file an application. But he has filed it even earlier apprehending possibly such confirmation. *A fortiori* therefore, the application is within time

7. The Civil Miscellaneous Second Appeal is allowed and the order of the lower Court is set aside and the subject-matter is remanded to the file of the District Munsif, Tiruvannamalai, for a full hearing on the merits.

There will be no order as to costs.

S. J. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Ratnavel Pandian, J.*

Syed Hameed .. *Petitioner**

v.

Commissioner, Thiruvarur Municipality ... *Respondent.*

Tamil Nadu District Municipalities Act (V of 1920), schedule IV, rules 30(2), 36 (1) and 36 (10)— Wilful default in payment of property tax—Decree of Civil Court—Levy held to be illegal and ultra vires*—Conviction unsustainable.*

Where the decree passed by a civil Court declared that the general revision and subsequent increase in tax made by a Municipality for a particular period of assessment are illegal and *ultra vires* and restrained the Municipality by means of a permanent injunction from realising any amount in pursuance of the demand notices and assessments, in the absence of materials to show that the decree has been set aside or stayed or at least an appeal has been filed against the same, the conviction and sentence passed by the criminal Court for the wilful default in payment of tax for that period cannot be sustained. In the circumstances, the decree of the civil Court has to be given effect to. [*Para.* 3.]

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate, Nagapattinam, dated 19th December, 1973, and passed in Crl. A. No 62 of 1973 (Calendar Case No. 1160 of 1973 on the file of the Court of the Sub-Magistrate, Tiruvarur).

A. Nagarajan, for Petitioner.

K. Alagiriswamy, for Respondent.

The Court made the following

ORDER:—This petition is filed by the accused, challenging the judgment of the learned Sub-Divisional Magistrate, Nagapattinam, in C.A. No. 62 of 1973 on his file, confirming the conviction and sentence passed by the learned Sub-Magistrate, Tiruvarur, in C.C. No. 1160 of 1973 on his file. The Commissioner of Tiruvarur Municipality preferred a complaint under schedule IV, rules 30(2), 36(1) and 36 (10) of the Tamil Nadu District Municipalities Act, for alleged wilful default in payment of property tax of Rs. 4927 against the accused. The prosecution examined two witnesses to speak about the service of the demand notice on the accused by registered post and marked Exhibit P-1 the postal acknowledgment. The accused contended in his statement under section 342, Criminal Procedure Code, that the tax levied is illegal and does not bear any relation to the annual value of the building as determined under Tamil Nadu Act (XVIII of 1960). Further, he stated that the Municipality had not observed the principles of the Act in making the assessment and that he had also filed a civil suit O.S. No. 226 of 1973 before the District Munsif, Tiruvarur, questioning the general revision and the subsequent increases in the tax. In addition to the statement, he filed a copy of the plaint in the said suit. The learned Sub-Magistrate, who tried the case, found the petitioner guilty under sections 30(2) and 36(1) of the District Municipalities Act, convicted him thereunder and sentenced him to pay a fine of Rs. 20, in default, to undergo simple imprisonment for two days, and further directed him to pay the house-tax of Rs. 4,927. On appeal, the learned Sub-Divisional Magistrate has confirmed the conviction and sentence passed and the direction given by the learned Sub-Magistrate. Aggrieved by the said decision, the accused has come forward with this revision petition.

2. Admittedly, a civil suit was filed by this petitioner in O.S. No.226 of 1973, challenging the general revision and the subsequent increases in tax from 1st October, 1970 to 31st March, 1973. A copy of the plaint in the said suit was filed along with the statement of the accused before the Sub-Magistrate. The prayer in the said plaint is to declare the general revision and subsequent increases in the tax made by the respondent Municipality on the buildings of the petitioner, as detailed in Annexure-A to the said plaint, beyond the fair-rent determinable under Madras Act (XVIII of 1960) for the period of assess-

*Crl. R.C. No. 69 of 1974. Crl. R.P. No. 68 of 1974. 21st March, 1975.

ment (from 1st October, 1970 to 31st March, 1973), as illegal and *ultra vires*, and to restrain the first defendant therein (respondent herein) by a permanent injunction from realising any amount as per the demand notices and assessement. It is seen that the plaint is signed by the petitioner on 28th June, 1973. The charge-sheet in this case is dated 2nd May, 1973 and received in Court on 10th May, 1973. Obviously, the suit was filed after the Municipality has taken criminal proceedings against the petitioner for his wilful omission to pay the tax due by him, as shown in the charge-sheet, amounting to Rs. 4,927. The trial Court, while dealing with the question regarding the pendency of a civil suit, held that the petitioner should have instituted the suit in the year 1970 itself, and after referring to a number of decisions dealing with the jurisdiction of a criminal Court, convicted and sentenced the petitioner as above. The appellate Court observed that a mere pendency of a civil suit will not in any manner curtail the statutory powers of the Municipality in launching prosecutions against persons who are allegedly guilty under the provisions of the Act. The petitioner has come forward with this revision petition to this Court on 21st January, 1974. During the hearing of this revision petition, Mr. Nagarajan, appearing for the petitioner, filed a certified copy of the plaint and a certified copy of the decree, passed in the suit O.S. No. 226 of 1973.

3. I gave time to the counsel appearing for the Municipality to verify whether the relevant period for which the assessment has been made and in respect of which the prosecution has been launched, is the period covered by the civil suit. After hearing the parties and scrutinising the documents, I am satisfied that the civil suit covers the assessment period in respect of which the prosecution is launched. So, in the interests of justice and for the convenience of Court, I have marked the copy of the plaint with the annexure as Exhibit C-1 and the copy of the decree as Exhibit C-2. Exhibit C-2 is dated 24th August, 1974, *i.e.*, after the revision was filed. The learned District Munsif, Tiruvarur, after hearing the suit, has passed a decree declaring that the general revision and subsequent increases in tax made by the Municipality for the abovesaid period of assessment are illegal and *ultra vires*, and restraining the Municipality, by means of a permanent injunction, from realising any amount as per the demand notices and assessment. In this revision petition, I am not sitting over the judgment of the learned District Munsif, to decide whether his decree is correct or not. As it is, the decree of the said civil Court stands. No material has been placed before me on the side of the respondent to show that the decree passed by the learned District Munsif has been set aside or stayed or at least an appeal has been filed. Under these circumstances, the decree of the civil Court has to be given effect to. As it stands now, the conviction and sentence passed and the direction given by the criminal Courts are based on the revision and increase of taxes, which are declared to be illegal and *ultra vires* by the civil Court. Therefore, I have no other option except to allow this revision petition and set aside the conviction and sentence passed and direction given by the Court below.

4. Accordingly, the revision petition is allowed The fine amount, paid shall be refunded to the petitioner.

V.S. *Petition allowed; conviction set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:—*Rathnavel Pandian, J.*

Damodaran ... *Petitioner**

v.

The Food Inspector, Thirumathipuram Town Panchayat, Thirumatiphuram .. *Respondent.*

Prevention of Food Adulteration Act (Central Act XXXVII of 1954) *sections* 7 *and* 16(1) *(a) (i) and rule* 22 *of the rules framed under the Act—Gingeli oil (edible oil) — Seizure of a quantity less than the quantity prescribed under the Act—Conviction on analysis—Not sustainable.*

Under rule 22 of the rules framed under the Prevention of Food Adultertion Act, in the case of gingeli oil (edible oil) the approximate quantity of sample to be taken for the purpose of analysis is 375 grams which in turn has to be divided into three equal parts and one such part, *i.e.*, 125 grams has to be sent for analysis. [*Para.* 3.]

Where the quantity of sample taken by the Food Inspector is less than the quantity prescribed under the rules any conviction based upon such analysis of the sample cannot be sustained. [*Para.* 6.]

On facts, in the instant case, the total quantity of 300 milli-litres was taken by the Food Inspector, it was found to weigh 275 grams.

A.I.R 1975 S.C. 189 followed.

Cases referred to :—

Rajaldas, G. Pamnani v. *State of Maharashtra,* A.I.R. 1975 S.C. 189.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Judgment of the Court of Session of North Arcot Division at Vellore, dated 19th November, 1973 and passed in Crl. A. No 51 of 1973 (Calendar Case No. 138 of 1973 on the file of the Court of the Sub-Divisional Magistrate-*cum*-District Munsif, Cheyyar.)

A. Nagarajan, for Petitioner.

The Public Prosecuter, No. III, for State on 9th January, 1975.

P. Chandrasekaran, for *the Public Prosecutor,* for State on 31st January, 1975 and 21st February, 1975.

The Court made the following

ORDER —This revision petition is filed by the accused against the judgment of the learned Sessions Judge, North Arcot, in C.A. 51 of 1973 on his file, confirming the conviction, but modifying the sentence, passed by the learned District Munsif-*cum*-Sub-Divisional Magistrate, Cheyyar, in C.C. No. 138 of 1973 on his file.

2. The petitioner-accused, on a complaint filed by the Food Inspector of Tiruvattipurm Town Panchayat under sections 7 and 16(1) (*a*) (*i*), read with section 2(1) (*a*) of the Prevention of Food Adulteration Act and rule 44 (*a*) of the rules framed thereunder, with the allegation that on 30th December 1971 at 3-15 P.M. he was found in possession of five litres of gingeli oil for sale and sold 300 millilitres for the purpose of analysis and that on analysis, it was found that the sample contained 12 per cent. of groundnut oil and hence adulterated, was found guilty under the said charge, convicted thereunder and sentenced to undergo rigorous imprisonment for six months and to pay a fine of Rs. 1,000, in default, to undergo rigorous imprisonment for three months. On appeal, the learned Sessions Judge, after confirming the conviction, modified the sentence by reducing it to the period already undergone and maintaining the sentence of fine.

3. The only point that has been urged before me by the learned counsel for the petitioner is that the samples were not taken in accordance with the provisions of the Act and the rules framed thereunder. Rule 22 states that in the case of gingeli oil (edible oil) the approximate quantity of sample to be taken for purposes of analysis is 375 grams which in turn has to be divided into three equal parts and one such part has to be sent

*Crl.R. C. No. 280 of 1974, Crl. R. P. No. 273 of 1974. *21st March,* 1975.

for analysis; in other words, 125 grams has to be sent to the analyst.

4. In this case, as per the evidence of P.W. 1 only a total quantity of 300 milli-litres has been taken by him and divided into three parts, that is, each part containing 100 milli-litres of oil. As there is no table available for my ready reckoning to find out the exact equivalent quantity in grams, Mr. Nagarajan, appearing for the petitioner, demonstrated in open Court in the presence of the learned Public Prosecutor, by weighing 300 milli-litres of gingeli oil and it was found to weigh 273 grams. Then, I asked the prosecution to verify the weighment of the quantity by taking instructions from the Government Analyst. Learned Public Prosecutor presented a memo. annexed with the opinion of the Government Analyst in the King Institute, Guindy, Madras-32, stating that 300 milli-litres of gingeli oil would weigh 275 grams. I have marked the said memo for convenience sake as Exhibt C.1. From the demonstration made by the defence counsel and the memo. Exhibit C.1, it is clear that the quantity that was seized by the Food Inspector from the petitioner is less than the quantity prescribed under the Act.

5. At this stage, Mr. Nagarajan relies on a decision of the Supreme Court in *Rajaldas G.Pamnani* v. *State of Maharashtra*[1] where their. Lordships have observed as follows:

> "The appellant also contended that samples were not taken in accordance with the provisions of the Act (Prevention of Food Adulteration Act) and the rules thereunder. Rule 22 states that in the case of asafoetida the approximate quantity to be supplied for analysis is 100 grams and in the case of compounded asafoetida 200 grams. The Public Analyst did not have the quantities mentioned in the rules for analysis. The appellant rightly contends that non-compliance with the quantity to be supplied caused not only infraction of the provisions but also injustice. The quantities mentioned are required for correct analysis. Shortage in quantity for analysis is not permitted by the statute."

6. Following the principles laid down in the above decision, I find that the quantity of the sample taken by the Food Inspector in this case is less than the quantity prescribed in the rules and therefore the conviction cannot be sustained.

7. In the result, the revision petition is allowed and the conviction and the sentence are set aside. The petitioner is acquitted of the offence charged. Fine, if collected, shall be refunded to the petitioner.

V.S. *Petition allowed.*
Conviction set aside.
Fine to be refunded.

1. A.I.R. 1975 S.C. 189.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:— *M.M. Ismail, J.*

Special Deputy Collector, Land Acquisition, Defence Equipment Factory, Tiruchirapalli .. *Appellant**

v.

Karuppayee Ammal and others ... *Respondents*

Land Acquisition Act (I of 1894), section 25 (1)—Acquisition of land—Compensation—Claimants agreed to amount at the time of enquiry—Further appeal by claimants—Whether compensation can be enhanced.

In the land acquisition proceedings, the claimants had agreed at the time of enquiry, to receive compensation at the rate of Rs. 400 per acre and therefore section 25 (1) of the Land Acquisition Act came into operation. On an appeal by the claimants for enhanced compensation, the Principal Subordinate Judge awarded enhanced compensation. On the question whether this was correct:

Held: *prima facie*, in view of the statutory provision in section 25 (1) the learned Principal Sub-ordinate Judge had no right to award compensation at the (enhanced rate) as against the rate fixed by the Land

*A.Nos. 197 to 206 of 1969. *6th February, 1975.*

Acquisition Officer and agreed to by the claimants. [*Para.* 3.]

Cases referred to:—

State of Madras v. *Alameluthayammal*, 82 L.W. 661: I.L.R. (1970) 1 Mad 137; A.I.R. 1970 Mad. 184 *State of Punjab* v. *Lachhman Dass, Mukand Lal* (*sons of L. Surjan Mal*), A.I.R. 1964 Punj. 68.

Appeals against the decree of the Court of the Subordinate Judge (Principal) of Tiruchirapalli in O.P. Nos. 176 to 184 and 186 of 1966, respectively.

The Additional Government Pleader, for Appellants.

P. Raghaviah, for Respondents.

The Court delivered the following

JUDGMENT:—These appeals are by the State and they have been preferred against the judgment and decrees of the learned Principal Subordinate Judge of Tiruchirapalli in O.P. Nos. 176 to 184 and 186 of 1966, respectively. They are concerned with the question as to proper compensation payable in respect of the lands belonging to the respondents herein, situate in Palanganangudi village in Triuchirapalli district, and acquired under the Land Acquistion Act for the Defence Equipment Factory, Tiruchirapalli. Those lands were acquired pursuant to the notification under section 4(1) of the Land Acquisition Act, dated 4th December, 1963. In all these cases, the Land Acquisition Officer awarded compensation at the rate of Rs. 4 per cent. The Court, on references made under section 18 of the Land Acquisition Act, enhanced the same to Rs. 5-50 per cent. In three cases, namely, A.S. No. 200 of 1969, A.S. No. 203 of 1969 and A.S. No. 205 of 1969, in addition to the compensation for the lands at the rate mentioned above, the Court also awarded compensation for the wells situate in the respective lands in question at the rate of Rs. 1,308-35, Rs. 1,358-35 and Rs. 1,340-02 respectively. In these appeals, the enhancement of the compensation from Rs. 4 to Rs. 5-50 per cent. as well as the award of compensation for the wells in the lands involved in the three appeals referred to above are being challenged.

2. The first point that is taken with regard to the enhancement of compenation is that the claimants themselves in the enquiry held pursuant to the notice under section 9 of the Land Acquisition Act, agreed to receive compensation at the rate of Rs.4/ per cent., that in view of that, it is not open to them to claim any enhanced compensation and that equally it is not open to the Court to enhance the compensation in exercise of its powers on a reference under section 18 of the Land Acquisition Act. Having regard to the facts of these cases as well as the legal position, this stand of the State is well-founded. Exhibit B-2 is a statement given by Karuppayeeammal, the claimant in O.P. No. 176 of 1966 and the respondent in A.S. No. 197 of 1969, before the Land Acquisition Officer on 24th July, 1964 agreeing to receive compensation at Rs. 400 per acre. Exhibit B-3 dated 24th July, 1964 is a statement given by Janaki Ammal, claimant in O.P. No. 181 of 1966 and respondent in A.S. No. 202 of 1969, before the Land Acquisition Officer agreeing to receive compensation at the rate of Rs. 400 per acre. Exhibit B-4 dated 24th July, 1964 is a similar statement give by the claimant in O.P. No. 182 of 1966 and respondent in A.S. No. 203 of 1969. Exhibit B-5 dated 24th July, 1954 is a similar statement given by the claimant in O.P.No. 183 of 1966 and respondent in A.S. No. 204 of 1969. Exhibit B-6 dated 24th, July 1964 is a similar statement given by the claimant in O.P. No. 184 of 1966 and respondent in A.S. No. 205 of 1969 and Exhibit B-7 dated 24th July, 1964 is a similar statement given by the claimant in O.P. No. 186 of 1966 and respondent in A.S. No. 206 of 1909. In the other four cases no such statement recorded from the claimants has been produced before the Court. On the other hand in the statements of the Land Acquisition Officer made to the Court, it was expressly stated that in all these cases at the time of the award enquiry on 24th July, 1964, the interested persons had agreed to the rate of Rs. 400 per acre when the Land Acquisition Officer informed them of the above rate at which compensation was proposed to be paid to the landowners. Even in the awards passed by the Land Acquisition Officer, it is clearly and categorically

mentioned that the interested persons had agreed to the rate of Rs. 400 per acre. Notwithstanding this, in the claim statements made by the claimants before the Court, they did not dispute the correctness of the statement contained in the awards as well as the statements forwarded by the Land Acquisition Officer to the Court stating that the interested persons had agreed to receive compensation at the rate of Rs. 400 per acre. Consequently, the position before the learned Principal Subordinate Judge was that in all these cases the claimants had agreed at the time of the award enquiry, to receive compensation at the rate of Rs. 400 per acre and therefore section 25 (1) of the Land Acquisition Act came into operation.

3. According to that statutory provision, section 25 (1) 'when the applicant has made a claim to compensation, pursuant to any notice given under section 9, the amount awarded to him by the Court shall not exceed the amount so claimed or be less than the amount awarded by the Collector under section 11. *Prima facie* in view of this statutory provision, the learned Principal Subordinate Judge had no right to award compensation at the rate of Rs.5-50 per cent as against Rs. 4 per cent fixed by the Land Acquisition Officer and agreed to by the claimants. However, Mr. P. Raghaviah, learned counsel for the respondents-claimants in these cases, put forward two contentions before me. One is that the said point was not argued before the learned Principal Subordinate Judge and it has not also been taken in the grounds of appeals before this Court and that therefore the appellant should not be allowed to raise the same at this stage. The second which is more or less a corollary to the first is that the failure on the part of the appellant to urge that point before the learned Principal Subordinate Judge must be taken to be a waiver on the part of the appellant to put forward such a claim. I am unable to accept either of these contentions of the learned counsel for the respondents. A Bench of this Court in *State of Madras* v. *Alameluthayammal and others* [1] had occasion to consider this question and with reference to the language of section 25(1) of the Land Acquisition Act, the Bench has pointed out that under sub-clause (1) of section 25 of the Act, the Court has no jurisdiction to award anything more than what has been claimed pursuant to any notification given under section 9 of the Act. Consequently, if the matter is one of jurisdiction, the fact that the appellant had not argued the point before the lower Court would not clothe the Court with the jurisdiction to do something which, it is prohibited from doing by the statutory provisions themselves. As I have pointed out already, the factual basis was there before the Court and all that could be said was that the legal position based upon that factual position was not argued before the lower Court. Once it is held that the lower Court has no jurisdiction to enhance the compensation in view of the fact that the claimants themselves have agreed to receive compensation at the rate of Rs. 4 per cent., the mere fact that that point was not argued specifically before the lower Court will not enable or empower the learned Principal Suborbinate Judge to enhance the compensation.

4. With regard to the second aspect, a Bench of the Punjab High Court in *Punjab State* v. *M/s. Lachhman Dass Mukand Lal, sons of L. Surjan Mal* [1] observed:

"The next question that requires to be settled is whether the objection on the basis of section 25 of the Act should be deemed to have been waived by the State and, therefore, the State is not entitled to raise this objection at this stage. Section 25 prescribed rules as to amount of compensation. I have already held that this provision is mandatory and there is no option left with the Court but to give effect to it. The provisions of section 25 really limit the jurisdiction of the Court in the matter of enhancement of compensation and thus there can be no question of waiver of these provisions. A Court cannot do what the statute expressly forbids. Neither by consent nor by waiver the mandatory provisions of the statute can be either

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1. A.I.R. 1970 Mad. 184: 82 L.W. 661 I.L.R. (1970) 1 Mad. 137.

1. A.I.R. 1964 Pun. 68.

modified or waived. Therefore, in my view, no question o waiver can arise. It is a statutory duty which is cast on the Court and effect must be given to it."

Consequently, notwithstanding the fact that there was no specific contention advanced before the trial Court, on the basis of the factual position referred to above, the Court had no jurisdiction whatever to enhance the compensation from Rs. 4 per cent to Rs. 5-50 per cent.

5. The second point raised in three of the appeals is about the value for the wells awarded by the learned Principal Subordinate Judge. The learned Principal Subordinate Judge has pointed out in paragraph 10 of his judgment that even the award proceedings clearly showed that the amounts referred to above had been spent for the digging of the wells in the respective survey numbers. Section Nos. 129/3, 129/12 and 139/3. The awards themselves showed that the amounts in question were borrowed by the respective claimants from the Government under the New Well Subsidy Scheme. If so, the inference is irresistible that the said amounts borrowed by the respective claimants from the Government under the New Well Subsidy Scheme were spent by them in digging the wells and that consequently they were entitled at least to the said amounts by way of compensation. Therefore, the award of the amounts referred to above for the wells involved in the three appeals, namely, A.S. Nos. 200, 203 and 205 of 1969 cannot be challenged.

6. The result is, A.S. Nos. 200 203, and 205 of 1969 are allowed in part and the other appeals, namely, A.S. Nos. 197 to 199, 201, 202, 204 and 206 of 1969 are allowed in full and the enhancement of compensation ordered by the learned Subordinate Judge from Rs. 4 per cent to Rs. 5-50 per cent is set aside and the value fixed by the Land Acquisition Officer will stand restored The award of compensation for the wells involved in A.S. Nos. 200, 203 and 205 of 1969 will stand. There will be no order as to costs, in any of the appeals.

S.J. *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT:— *P.S. Kailasam* and *A. Varadarajan, JJ.*

Commissioner, Pattukottai Municipality, Thanjavur District .. *Appellant**

v.

Chandrasekaran (Minor), represented by his guardian and father Natanam Chettiar .. *Respondent.*

Tamil Nadu District Municipalities Act (V of 1920), section 216 (3)—Kottai poramboke—Construction of building—Order by Municipality to demolish the building—Validit.

A building was constructed on kottai poramboke within the municipal limits of Pattukottai village. Before sanction of the plan by the municipal authority the building was constructed. Therefore a notice was served on the owner by the municipality to demolish the unauthorised construction. On the question of the validity of this order.

Held, the only contravention is that the building is put up on poramboke. As the building rules have not been contravened in the instant case, the municipality need not direct demolition of the building as on the facts that step is not called for. [*Paras.* 14 *and* 15.]

It will be open to the Government which will be the affected party to take such steps as are open to it to redress their grievances, if any. [*Para.* 15.]

Cases referred to:—

Mayandi v. *Madura Municipality*, I.L.R. (1941) Mad. 406: (1940) 2 M.L.J. 1032: A.I.R. (1941) Mad. 259; *Kakinada Municipality* v. *Satyaanarayana*, (1955) An. W.R. 384; *Kallianikutty Amma* v. *State of Kerala*, A.I.R. 1958 Ker. 279.

Appeal under clause 15 of the Letters Patent against the Order of the Honour-

*W.A. No. 311 of 1972; W. P. No. 148 of 1972. *31st January*, 1975.

able Mr. Justice Ramaprasada Rao, dated 3rd April, 1972 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 148 of 1972 presented under Article 226 of the Constitution of India to issue a writ of *mandamus* directing the respondents to forbear from demolishing the petitioner's building in section No. 68/A-5 of Pattukottai village or in any way interfering with the petitioners enjoyment of the same.

G. Ramaswami, for *R. Balasubramanian* for the Appellant.

K. Alagirswami, for the Respondent.

The Order of the Court was delivered by

Kailasam, J:—This appeal is preferred by the Commissioner of Pattukottai municipality against the judgment of Ramaprasada Rao, J., in Writ Petition No. 148 of 1972. The writ petition was filed by minor Chandrasekaran represented by his father and guardian Natanam Chettiar for the issue of a writ in the nature of *mandamus* or any other appropriate writ directing the respondent-municipality to forbear from demolishing the petitioner's building in Section No. 68/A-5 of Pattukottai village.

2. The respondent herein commenced putting up a construction in Section No. 68/A-5 within the municipal limits of Pauttkottai village. On the 4th of December, 1970 he applied to the municipality for permission to put up a godown over the land and submitted building plans for the purpose. Before sanction of the plan, the respondent started construction on the 4th of December, 1970 and a door frame on the site was fixed on 15th of December, 1970. As the respondent had commenced building without getting a sanction, a notice under section 216 (1) (i) (*a*) of the Tamil Nadu District Municipalities Act dated 19th December, 1970 was served on him calling on him to demolish the unauthorised construction. This notice was acknowledged by him on 22nd December, 1970. On 3rd December, 1971 the first plan submitted for consideration was rejected on the ground that there was a violation of a specific building requisition. The respondent applied for a second time for approval of the site and for further construction and forwarded fresh plans. The second application was made on 5th April, 1971. On 21st April, 1971 the provisional order issued under section 216 (1) (i) (*a*) of the Act calling upon the respondent to demolish the construction was confirmed under section 216 (3). The second plan submitted by the respondent on 5th April, 1971 was also rejected on the ground that the respondent proceeded to construct without permission and he did not obey the provisional order made under section 216 (1) (i) (*a*) of the Act. The rejection of the first plan was acknowledged by the respondent on 24th April, 1971. The respondent filed a third plan for sanction of the building plan and approval of the site and furnished fresh plans on 27th April, 1971, but the third plan was returned on 30th April, 1971 on the ground that the building would be an encroachment upon the Government land.

3. It is not in dispute that the site in which the building was sought to be built was kottai poramboke and is Government land. Proceeding for non-compliance with the direction of the municipality was taken and the provisional order under section 216(1) was confirmed under section 216(3) of the Act. The respondent was then prosecuted before the Special First Class Magistrate, Pattukottai, for an offence under section 216(1), (2) and (3) and section 317 of the Act and the case is pending. An appeal was filed by the respondent but no order was passed by the municipal council. In the writ petition the respondent contended that after the municipality initiated the criminal proceeding as contemplated under the Act, the municipality is not entitled to pull down the building as it had no jurisdiction to demolish it by itself. According to the respondent the only course open to the municipality for the non-compliance of the direction under section 216 is to prosecute for an offence under section 317.

4. Before the learned Judge and before us it was contended that a direction under section 216(1) to (3) to demolish an unauthorised construction, if not complied

with can only be dealt with as an offence punishable under section 317 and the municipality cannot on its own force demolish the unauthorised construction. The learned Judge held that the municipality had the power to prosecute a delinquent person but had no power to enforce the demolition of that building because they did not sanction the plan and in the particular case they could not sanction the plan as the building was sought to to be put up in a kottai poramboke. The learned Judge was also of the view that if the municipality intended to demolish a construction put up within its precincts then it should initially possess the authority to permit such a construction or in the alternative be of the view that the construction is not in accordance with the content of the permission granted by it to build and if it has no power to give such permission to construct then it follows that it has equally no power to direct a demolition of such a structure unless the Act specially empowers it to do so. The learned Judge further observed that as the land in which the building was put up is kottai poramboke, it is not for the municipality to feel aggrieved about it whatever rights the Government may have as against the encroacher and the municipality cannot take proceedings.

5. Chapter X of the Act deals with building regulations and sections 197 to 206 deal with buildings other than huts. Section 97 provides that if any person intends to construct or reconstruct a building other than a hut, he shall send to the executive authority an application in writing for the approval of the site, together with a site plan of the land and an application in writing for permission to execute the work together with a ground-plan, elevations and sections of the building and a specification of the work. Section 199 provides that the construction or reconstruction of a building shall not be begun unless and until the executive authority has granted permission for the execution of the work. Section 216 confers powers on the executive authority to take certain action if the construction or reconstruction of the building had been commenced without obtaining the permission or carried out or completed contrary to the permission granted or any alternative made contrary to the notice issued. He, the authority may make a provisional order requiring the owner or the builder to demolish the work done in order to bring the construction work in conformity with the Act, bye-laws or rules. Section 216 (2) requires the executive authority to serve a copy of the provisional order made under sub-section (1) on the owner of the building together with a notice requiring him to show cause within a reasonable time to be named in such notice why the order should not be confirmed. Under sub-section (3) if the owner fails to show cause to the satisfaction of the executive authority, the executive authority may confirm the order with any modification he may think fit to make, and such order shall then be binding on the owner. This section, as is seen, enables the executive authority to require the owner to demolish the work done.

6. Section 317 of the Act enables the executive authority to take action against a person who had failed to obey the direction given to him under section 216 and prosecute him. The person who failed to obey may be fined by the criminal Court up to a sum of Rs. 500 in the case of a building as also a sum of Rs. 100 for each day during which the offence is proved to have continued after the first day. Thus in addition to action taken under section 216 by passing an order directing the owner to demolish the work done, criminal prosecution can also be taken.

7 Section 339 which comes under Chapter XVI and relates to power to enforce licensing provisions, orders, etc. and sub-section (1) provides that whenever by any notice, requisition or order under this Act, or under any rule, by-law or regulation made under it, any person is required to execute any work or to take any measures or do anything a reasonable time shall be named in such notice, requisition or order within which the work shall be executed, the measures taken, or the thing done. Under sub-section (2), if such notice, requisition, or order is not complied with within the time so named the executive authority may cause such work to be executed or may take any measures or do anything

which may, in his opinion, be necessary for giving due effect to the notice, requisition or order as aforesaid.

8. Section 339 is a general provision which refers to any notice that may be given under the Act or any rule, by-law or regulation to execute any work or to take any measures or do anything within a reasonable time to be named in such notice. If such notice, requisition or order is not complied within the time so named, the executive authority may cause such work to be executed or may take any measures or do anything which may, in his opinion, be necessary for giving due effect to the notice, requisition or order as aforesaid. Section 339 (2) confers the power on the executive authority to cause such work to be executed or to take measures or do anything which may, in his opinion, be necessary for giving due effect to the notice, etc.

9. Under section 339 a notice and order under the Act was given and reasonable time was also given requiring the respondent to enable him to carry out the work. The provision of section 339 has been satisfied; and under section 339 (2) the executive authorities have the right to cause such work to be executed or to take any measures or do anything which may, in their opinon, be necessary for giving due effect to the notice. The attack of the learned counsel for the respondent against the legality of the order is that the rules relating to building are found under section 216 which are special provisions and as the special provisions always override the general provisions resort could not be made to the general provisions when there are special provisions in regard to a matter. This contention overlooks the fact that while section 216 provides for a provisional order requiring the owner to demolish the work done followed by a final order confirming the provisional order, section 339 provides steps to be taken when the owner does not comply with the notice. When the owner neglects to obey the order under section 216 (3) there could be no further obstruction to the executive authority for taking action under section 339. Section 317 relates to prosecution for failure to comply with the order under section 216. But that does not in any way affect the right of the executive authority to take action under section 339 (2).

10. The learned counsel for the respondent relied on a decision of the Bench of this Court in *Mayandi* v. *Madura Municipality*[1]. The facts of the case are that the owner applied to the municipality for sanction on 25th June, 1931 to erect a building and on 17th July, 1931 the Sanitary Inspector reported no objection to the erection of the building, but without waiting for the sanction of the executive engineer, the appellant-owner commenced the building and completed the work. On 20th July, 1931 the executive authority called upon the appellant to submit a a plan of the lay-out of the whole survey number. This requirement was, however, not complied with until 9th May, 1932. After the executive engineer had on 20th July, 1931 called for a plan of the lay-out of the whole survey number, no further communication was addressed to the appellant until 5th May, 1932, when the Special Officer issued a notice purporting to be pursuant to sections 338 and 339, by which he required the appellant to demolish his building within four days on the ground that it had been erected without municipal licence. On 7th June, 1932 the Special Officer sent men to the site for the purpose of demolishing the building and this work was carried out in the presence of officials of the municipality. On the facts the Bench after considering the provisions of section 216(1), (2) and (3) held that an order passed under section 216(3) would be binding on the owner, for if an order under sub-section (3) becomes effective, it can be enforced by virtue of the provisions of section 339. The learned counsel for the respondent relied on the following passage in the aforesaid Bench decision which runs as follows:

> "The Act does not direct any special procedure to be followed for remedying breaches of the law with regard to licences, permissions, registrations, apart from that to be found in the chapter

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1. I.L.R. 1941 Mad. 406: (1940) 2 M.L.J. 1032: A.I.R. 1941 Mad. 259.

> relating to building regulations. Therefore, except in the case of buildings, direct action may be taken under sections 338 and 339."

We do not find that this passage, in any way, helps the respondent for what is stated is that except in the case of buildings, direct action may be taken under section 339; but in the case of buildings, action should be taken under section 216 before proceedings were taken under section 339. This is made specific by the observation, "if an order under sub-section (3) becomes effective, it can be enforced by virtue of the provisions of section 339. This decision therefore not only does not support the respondent's contention but clearly negatives his contention.

11. The learned counsel for the respondent also relied on the decision of the Andhra Pradesh High Court in *Kakinada Municipality* v. *Satyanarayana* [1]. In that case the Court held that the provisions of section 216 do not enable the municipality to direct demolition of a building merely because the building ultimately erected is not in accordance with the approved plan. It held that it is necessary for the municipality, and if the matter comes to the Court—for the Court, to satisfy itself whether the building is not in conformity with the Act, by-laws, rules, direction or requisition as aforesaid. These observations do not help the respondent, for the decision was based on the facts of that case.

12. In *Kallianikutty Amma* v. *State of Kerala* [2] the Court held that Chapter X of the Act contains what are called building regulations and so long as that Chapter contains provisions as to how contraventions thereof should be dealt with, the municipality cannot have recourse to the general provisions in section 338 for such contraventions. In coming to the conclusion the learned Judge relied on the decision of the Bench of this Court (already referred to) in *Mayandi Chettiar* v. *Madura Municipality* [3] but the passage which we have underlined, namely, that proceedings under section 339 can be taken after action was taken under section 216(1) to (3) has not been noticed by the learned Judge. We therefore find that the three decisions cited by the learned counsel for the respondent do not support his contention.

13. It was next urged that when several persons are allowed to put up buildings in kottai poramboke, the respondent was denied permission. The respondent has alleged in para. 6 of his affidavit that the municipality had declined to grant him permission while various owners were given permission to build about 40 houses in S. No. 68/A-5. This allegation was denied in the counter-affidavit. But in the reply affidavit the respondent had given particulars about 40 houses; but as the municipality had no opportunity to deny the specific allegations, nothing was done further. On the allegations on record we are unable to say that the respondent was discriminated against.

14. We feel therefore that under section 339 the executive authority have the right to cause such work to be executed or to take any measures or do anything which may, in their opinion, be necessary for giving due effect to the notice. Having found so, we asked the learned counsel for the municipality to inform us whether the building rules had in any way been contravened. The learned counsel informed us that the building rules had not been contravened. The only contravention is that that the building is put upon a poramboke. As the building rules have not been contravened, we do not think we would be justified in interfering with the order of the learned Judge to enable the municipality to demolish the building.

15. In the circumstances, while setting out the position of law so far as the powers of the municipality are concerned, we refrain from reversing the order of the learned Judge granting a writ directing the municipality to refrain from demolishing the building. We feel on the facts of the case it is not necessary that the relief prayed for by the municipality should be granted. The only objection

1. (1955) 1 An.W.R. 384.
2. (1958) M.L.J. Crl. 153: 1958 K.L.T. 116: A.I.R. 1958 Ker. 279.
3. (1940) 2 M.L.J. 1032: A.I.R. 1941. Mad. 259.

is that the building is on a poramboke. It will be open to the Government which will be the affected party to take such steps as are open to it to redress their grievances, if any. The prosecution that is filed by the municipality will go on and will be disposed of according to law. With these observations, we dismiss the writ appeal. There will be no order as to costs.

S.J. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*B.S. Somasundaram, J.*

Superintendent Engineer, Erode Electricity System, Erode *Petitioner* in Crl. R.C. Nos. 493 of 1972 and 169 of 1973 (Accused)*

v.

Executive Officer, Town Panchayat, Bhavani .. *Respondent* in Crl. R.C. No. 493 of 1972 (Complainant).

Commissioner, Erode Municipality, Erode .. *Respondent* in Crl. R.C. No. 169 of 1973. (Complainant).

The Madras State Electricity Board, represented by the Superintending Engineer, Pykara Electricity System, Coimbatore .. *Petitioner* in C.R.P. No. 2637 of 1972 (Defendant).

v.

The Executive Officer, Sulur Town Panchayat, Pallacam Taluk, Coimbatore District . *Respondent* in do. (Plaintiff).

Tamil Nadu District Municipalities Act (*VI of* 1920), *sections* 93, 95 *and rule* 30 *in Schedule IV—Tamil Nadu Panchayat Act* (XXXV *of* 1958), *section* 121—*Payment of profession tax—Madras State Electricity system—Whether liable to pay profession tax—Tamil Nadu General Clauses Act* (*X of* 1897), *section* 3 (22)—*Person—Definition of.*

Section 3 (22) of the Tamil Nadu General Clauses Act defines a "person" as including any company or association of individuals, whether incorporated or not. Therefore the Madras Electricity system will come under the definition of "person" in the General Clauses Act, and it is, therefore, clear that the electricity system is liable to pay profession tax as assessee in every one of its centres or branches situate in municipalities or panchayats, where it transacts business in a concerned half-year. [*Para.* 1.]

Cases referred do :—

Madras State Electricity Board v. *Gobichettipalayam Municipality*, (1968) 2 M.L.J. 214.

Crl. R.C. No. 493 of 1972 *and* 196 of 1973:—

Petitions under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Judgments of the (1) Court of the Sub-Divisional Judicial Magistrate, Erode, dated 9th February, 1972 and passed in C.A. No. 6 of 1972 (C.C. No. 2590 of 1971 on the file of the Court of the Judicial Sub-Magistrate, Bhavani) (in Crl. R.C. No. 493 of 1972) and (2) of the Court of the Honorary Special First Class Magistrate, Erode, dated 23rd March, 1972 and made in S.T.R. No. 191 of 1972 (in Crl. R.C. No. 169 of 1973).

C.R.P. No. 2637 *of* 1972:—

Petition under section 25 of the Provincial Small Causes Court Act praying the High Court to revise the decree of the Court of the District Munsif, Tiruppur, dated 22nd June, 1972 and passed in S.C.S. No. 173 of 1972.

R. Veeramani, for Petitioner.

N. Sivamani, for the Respondent in Crl. R.C. No. 493 of 1972.

K. Alagiriswamy, for Respondent in Crl. R.C. No. 169 of 1973, and in C.R.P. No. 2637 of 1972.

The Public Prosecutor No. 4 for State, in both Crl. R.C. Petitions.

The Court made the following

ORDER :—The question that arises in all these petitions is whether the Madras

*Cr.R.C. Nos. 493 of 1972 and 169 of 1973; C.R.P. Nos. 478 of 1972 and 165 of 1973 and C.R.P. No. 2637 of 1972. *22nd July*, 1974.

State Electricity Board, a statutory body, transacting the business of the supply of electricity to consumers in many municipalities and panchayats of the State is liable to pay profession tax. The Courts below have held that it is liable. Section 93 of the Tamil Nadu District Municipalities Act, 1920, enables the Municipal Council to determine by a resolution the payment of profession tax by every company and person transacting business within its limits for more than 60 days in any half year. Section 95 of the Act provides for the service of notice on such company or person and this notice should give them 15 days time for payment. Rule 30 in Schedule IV states that if the amount that is demanded by notice is not paid within the time prescribed, the executive authority may recover the amount by distraint. If such distraint is not practicable, the authority may resort to a prosecution. Rule 36 provides for the punishment. Similarly, section 121 of the Tamil Nadu Panchayats Act provides for the levy of profession tax. Section 161 of the said Act provides for penalty for failure to comply with a demand notice. There is no definition of the word "person" either in the Tamil Nadu District Municipalities Act or in the Tamil Nadu Panchayats Act. Sub-section (22) of section 3 of the Tamil Nadu General Clauses Act defines a "person" as including any company or association of individuals, whether incorporated or not. Therefore, the Madras Electricity System will come under the definition of 'person' in the General Clauses Act, and it is therefore clear that the said Electricity System is liable to pay profession tax as assessee in every one of its centres or branches situate in municipalities or panchayats, where it transacts business in a concerned half year. I am in complete agreement with the views expressed by Anantanarayanan C.J., in *Madras State Electricity Board* v. *Gobichettypalayam Municipality*[1] The Courts below have directed the Electricity system to pay the profession tax.

8. In the two Criminal Revision Cases, the Superintending Engineer, Erode Electricity System has been sentenced to pay a fine. Considering the circumstances of the case, while confirming the convictions, I set aside the sentence of fine imposed in both the cases and admonish the petitioner under section 3 of the Probation of Offenders Act. If the fine amount had already been paid, it shall be refunded to the petitioner. The order directing the petitioner to pay the postal charges is also set aside. The Civil Revision Petition is dismissed. The parties will bear their own costs throughout. If the profession tax is in arrears, the petitioner shall pay the same within two months from to-day.

R.S. —— *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—*M.M. Ismail, J.*

M/s. Bright Brothers (Private) Limited, Bombay .. *Appellant**

v.

J.K. Sayani .. *Respondent.*

Indian Contract Act (*IX of* 1872), *section* 206—*Termination of Agency—Suit for compensation—Agency agreement not for specified period—Notice of termination whether necessary—Interpretation of statutes—Scope of section* 206 "*Such revocation or renunciation*" *in section* 206—*Refers to section* 205.

The requirement of reasonable notice of revocation or renunciation contemplated by section 206 (of the Indian Contract Act) is applicable only to the "previous revocation and renunciation" dealt with by section 205, that is, it is applicable only to agencies in which the parties have contracted either expressly or by necessary inplication that the agency should continue for a particular period of time. [*Para*. 20.]

It is one of the cardinal principles of interpretation that no word used by the legislature in a statute should be ignored or should be held to be meaningless,

1. (1968) 2 M.L.J. 214.

*A.No. 872 of 1970. 2nd *January*, 1975.

superfluous or otiose, unless the Court is driven to such a conclusion, having regard to the scheme, object and other relevant circumstances of the statutory provision. If there is nothing to modify or qualify a language which a statute contains, it must be construed in the ordinary, and natural meaning of the words it contains. [*Para.* 13.]

The expression, "such revocation or renunciation" occurring in section 206 will refer only to the "revocation and renunciation" dealt with in section 205. [*Para.* 12.]

Cases referred to:—

Levy v. *Goldhill*, (1917) 2 Ch. 297, Ex-parte *George Staplyton Barmos*, (1896) A.C. 146; *Commr. of Income-tax Punjab, Himachal Pradesh and Bilaspur, Simla* v. *Jagan Nath Maheshwary*, (1957) 32 I.T.R. 418 at 431: A.I.R. 1957 Punj 226; *Llanelly Railway and Book Company* v. *London and North-Western Railway Company*, (1873) 8 Ch. A. 942 at 949-950; In re *Shaw Wallace and Company* A.I.R. 1931 Cal. 676; *Martin-Baker Aircraft Company Limited and another* v. *Canadian Flight Equipment Limited*, (1955) 2 All.E.R. 722 at 735.

Appeal against the decree of the City Civil Court (Principal Judge), Madras, in O.S. No 4905 of 1968.

V.K.T. Chari, for *V. Srinivasan*, for Appellant.

K.N. Balasubramaniam, for Respondent.

The Court delivered the following

JUDGMENT:—The defendants in O.S. No. 4905 of 1968 on the file of the City Civil Court, Madras, are the appellants herein. Since the appeal was argued before me within a very narrow compass, it is unnecessary to refer to the facts of this case in great detail. The respondent is a wholesale dealer in plastic goods doing business at Madras, while the appellants herein are manufacturers of plastic goods, having their office and business premises at Bombay. In or about 1952 there was an arrangement between the appellants and the respondent under which the respondent became the sole selling agent of the appellants with regard to specified areas. The terms of that arrangement admittedly had not been reduced to writing. The respondent had been purchasing the goods of the appellants as well as booking orders for the sale of the appellants' goods and forwarding those orders to the appellants for being executed. A commission of 6¼ per cent. was being paid by the appellants to the respondent in respect of the orders so executed as well as on the goods supplied by the appellants to the respondent directly. An extra commission of 1¼ per cent. and concession regarding Central sales tax were also given to the respondent by the appellants. This arrangement which was in force from 1952 onwards was modified by a letter dated 27th February, 1964 written by the appellants to the respondent herein, marked as Exhibit A-44. Under this arrangement, the nature of the relationship between the parties was not altered, but only the remuneration received by the respondent by way of commission was changed. Under the revised terms, the respondent was to get only 6-1/4 per cent. towards commission on all orders either booked in the name of the respondent or booked in the name of third parties and no additional commission or rebate regarding Central sales tax was payable to the respondent. However, a commission called, "Target Commission" of 1¼ per cent. was to be paid by the appellants to the respondent, if the annual turnover exceeded a particular limit. This agency of the respondent was terminated by a letter dated 28/30th September, 1964 marked as Exhibit B-56. It is therefore the respondent instituted the present suit for recovery of a sum of Rs. 50,000 from the appellants herein. The said sum of Rs. 50,000 included the amounts claimed by the respondent under three heads. One was that the respondent was entitled to a reasonable notice before his agency was terminated, that that reasonable notice would be a notice of 12 months, that the respondent was earning a commission of Rs. 4,000 per month and that therefore the amount to which he would be entitled for the said notice period would be Rs. 48,000. The second was that he was entitled to a commission of Rs. 12,000 on the actual orders booked

by him before the termination of his agency which were subsequently executed, some of them directly and some of them after having been re-booked in the name of the new agent appointed in the place of the respondent. The third was that the respondent was entitled to compensation for the loss suffered by him in payment of salary, etc., to the staff employed by him in connection with the agency business. Thus, the total of these three sums came to Rs. 75,000. The respondent admitted that as on the date of termination of the agency, he owed a sum of Rs. 13,432-41 to the appellants. Deducting the said sum of Rs 1,34,432-41 from the sum of Rs. 75,000 the balance came to Rs. 61,567-59 However, the respondent restricted his claim in the suit to a round figure of Rs. 50,000.

2. The appellants contested the claim of the respondent in this behalf. They contended that the respondent was not their agent and that he was only a stockist for their goods; they also denied that there was any need to give any notice before terminating the relationship that existed between the parties. There were certain other defences also put forward by the appellants as reflected in the following issues framed by the trial Court:

(1) Whether the plaintiff is the sole selling agent for the plastic goods manufactured by the defendants for the States of Tamil Nadu and Andhra Pradesh or whether he was only a stockist?

(2) What were the terms and conditions of the juial relationship between the plaintiff and the defendants?

(3) Whether the termination of the agency of the plaintiff by the defendants is valid and binding?

(4) Whether the settlement pleaded by the defendants in paragraphs 13, 14 and 15 of the written statement is true and valid and binding on the plainiff?

(5) Is the termination was (sic) in breach of the contract and the settlement pleaded is not true and valid?

(6) To what relief is the plaintiff entitled?

3. The learned Principal Judge, City Civil Court, Madras, by his judgment and decree dated 26th March, 1970 came to the conclusion that the relationship of principal and agent existed between the appellants and the respondent, that the respondent was acting as the agent of the appellants as far as Madras State was concerned and that he was the sole selling agent of the appellants' goods in that area. He further held that there was no express understanding between the parties that the respondent should not deal in the goods of other manufacturers, that there was no express understanding to the *contra* either and that therefore the fact that the respondent sold the goods of other manufacturers would not constitute a misconduct on his part so as to entitle the appellants herein to terminate the agency of the respondent without giving a reasonable notice. The learned trial Judge also recorded a finding that there was no settlement as pleaded by the appellants herein. Finally he came to the conclusion that under section 206 of the Indian Contract Act, 1872, the respondent was entitled to a reasonable notice, that that reasonable notice, having regard to the circumstances of the case, will be one of four months and that in this case admittedly there being no such notice, the respondent was entitled to the commission for the notice period, which was determined by the learned trial Judge at Rs.16,000 at the rate of Rs. 4,000 per month. With regard to the claim of the respondent that he was entitled to a commission of Rs. 12,000 on the orders booked by him prior to the termination of the agency, but executed later, the learned trial Judge fixed the amount at Rs. 6,250. He rejected the claim of the respondent for a sum of Rs. 15,000 referred to already. In the result, he came to the conclusion that the respondent was entitled to a sum of Rs. 16,000 plus Rs. 6,250 totalling Rs. 22,250 from the appellants herein. Deducting therefrom a sum of Rs. 13,432-41 which admittedly the respondent owed to the appellants herein, the learned trial Judge passed a decree for a sum of Rs. 8,817-59 in favour of the respondent

in the present suit. It is against this judgment and decree that the present appeal has been filed by the defendants in the suit.

4. Mr. V.K. Thiruvenkatachari appearing for the appellants did not seriously challenge the finding of the learned trial Judge that the respondent would be entitled to a sum of Rs. 6,250-by way of commission on the orders booked by him prior to the termination of the agency but executed later. However, he contended that the conclusion of the learned trial Judge that the respondent was entitled to a reasonable notice before termination of the agency is erroeous and that therefore the award of Rs. 16,000 by way of damages for the termination of agency without notice is unsustainable, and if that conclusion of the learned trial Judge is set aside, the result would be that the appellants would be liable to pay a sum of Rs. 6,250 to the respondent and the respondent would be liable to pay a sum of Rs. 13,432-41 to the appellants with the result no decree could be passed in favour of the respondent herein for any amount in the present suit. Consquently, the only question for consideration before me in the appeal, is whether the respondent was entitled to a reasonable notice before termination of his agency as held by the learned trial Judge.

5. The argument on behalf of the appellants in this behalf is two fold. One is that the respondent was merely a selling agent for the appellants herein and that such a selling agency can be terminated summarily without any notice. In support of this contention, reliance was placed on the following statement found in paragraph 678 of Halsbury's Laws of England, Fourth Edition, Volume I (Pages 527-528).

> "In the case of an agent who is a mere commission agent with no obligation to seek orders for the principal and who is in no other sense 'employed' by the principal, the agency may be terminated summarily."

The above statement of law in Halsbury's Laws of England is based upon certain decisions which included *Levy v. Goldhill.*[1] However, it is unnecessary to consider this contention for the reason that it does not appear to have been put forward in that form before the trial Court. On the other hand, the learned trial Judge in paragraph 14 of his judgment points out that in paragraph 6 of the written statement filed by the appellants herein it was stated that the relationship between the respondent and the appellants was that of principal to principal in respect of goods purchased by him from the appellants and *del credere* agent in respect of orders placed by him on behalf of other dealers. Whether the above statement of law contained in the Halsbury's Laws of England will apply even to a case of a *del credere* agent is not clear. In any event, since I am accepting the other argument advanced on behalf of the appellants, it is unnecessary to pursue this contention further.

6. The other ground which is substantial is that under the provisions of the Indian Contract Act, 1872, hereinafter referred to as the Act, the respondent herein was not entitled to a resonable notice, as held by the learned trial Judge and section 206 of the Act on which reliance has been placed by the learned trial Judge does not apply to a case like the present one, where no period for agency has been agreed to between the parties either expressly or by necessary implication and it is this contention which I am considering in this appeal.

7. Chapter X of the Act deals with agency and contains sections 182 to 238 Ten sections commencing from sections 201 to 210 fall under a sub-heading "Revocation o authority." As will be clear from the discussion that follows, even the expression, "Revocation of authority" may not be appropriate and the appropriate sub-heading could be only "Termination of authority" or "Termination of agency", because revocation is only one mode of terminating an agency. Section 201 deals with the methods in which an agency can be terminated. It says that an agency can be terminated by the principal revoking his authority; or by the agent renouncing the business

1. (1917) 2 Ch. 297.

of the agency; or by the business of the agency being completed; or by either the principal or agent dying or becoming of unsound mind; or by the principal being adjudicated an insolvent under the provisions of any Act for the time being in force for the relief of insolvent-debtors Having enumerated various methods by which an agency can be terminated, section 202 deals with a specific case of what is generally called, "an agency coupled with interest." According to that section, where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest. Section 203 provides that the principal may, save as is otherwise provided by the last preceding section, revoke the authority given to his agent at any time before the authority has been exercised so as to bind the principal. Thus, it will be seen that se ctions 202 deals with the termination of an agency coupled with interest, that is, it is not confined to any particular mode of termination, but to all methods of termination On the other hand, section 203 deals with revocation only and provides that the principal is entitled to revoke the authority given to his agent at any time before the authority has been exercised so as to bind the principal. But this right of the principal is subject to section 202. Section 204 again deals with the revocation of the authority of an agent by a principal and according to that section, the principal cannot revoke the authority given to his agent, after the authority has been partly exercised so far as regards such acts and obligations as arise from acts already done in the agency. Thus it will be seen that sections 203 and 204 are connected in the sense that while the former entitles the principal to revoke the authority given to his agent at any time before the authority has been exercised so as to bind the principal, the latter disables the principal from revoking the authority given to his agent after the authority has been partly exercised so far as regards such acts and obligations as arise from acts already done in the agency

8. Then follow two sections which are immediately relevant for the consideration of the question arising in this appeal, namely, sections 205 and 206 which are as follows:

> "205. Where there is an express or implied contract that the agency should be continued for any period of time, the principal, must make compensation to the agent, or the agent to the principal, as the case may be, for any previous revocation or renunciation of the agency without sufficient cause.
>
> 206. Reasonable notice must be given of such revocation or renunciation; otherwise the damage thereby resulting to the principal or the agent, as the case may be, must be made good to the one by the other."

Section 207 states that revocation and renunciation may be expresse or may be implied and the section reads:

> "Revocation and renunciation may be expresse or may be implied in the conduct of the principal or agent respectively."

Sections 208 to 210 dealing with termination of the agency are not relevant for thr present discussion.

9. Section 205 provides that if the principal and the agent agree that there should be a fixed term for the agency, whether the agreement is express or implied, neither party can terminate the agency prematurely, that is, prior to the expiration of that period without paying compensation to the other party, unless such termination is for a sufficient cause. There is no dispute before me that this section will apply only when the parties have agreed on the agency continuing for a specified period of time. As far as the present case is concerned, it is common ground that the appellants and the respondent had not agreed that the agency should continue for any particular period of time.

10. It is section 206 alone that deals with the requirement of a reasonable notice and the immediate point for consideration is when that section uses the expression, "such revocation or renuncia-

tion'', does it relate only to the "previous revoction or renunciation" mentioned in section 20 or if it covers any revocation or renunciation. If section 206 is correlated to section 205, it is not disputed before me that the requirement of reasonable notice will apply only to a case of agency where the principal and the agent had contracted that the agency should be continued for any period of time and that if they had not agreed on any such period of time for the agency, section 206 will not apply. The argument of the learned counsel for the appellants is that the expression, "such revocation or renunciation" occurring in section 206 necessarily makes that section applicable to the cases governed by section 205 only, that in the present case admittedly the agency being not for a prescribed period, section 206 is not attracted and that therefore the respondent was not entitled to a reasonable notice. On the other hand, the argument of the learned counsel for the respondent is that the expression, "such revocation or renunciation" occurring in section 206 will take in every revocation or renunciation dealt with by the relevant provisions of the Act relating to agency and it is not confined only to the agency falling within the scope of section 205. It is admitted before me that barring certain observations of the High Court of Calcutta in *Shaw Wallace & Company* [1] there is no authority of any Court in this country on this point, namely, whether section 206 covers only the revocation and renuncation mentioned in section 205 or it takes in every revocation and renunciation of agency dealt with by the Act.

11. Before referring to the decision of the High Court of Calcutta referred to above, I shall attempt to construe the sections according to the ordinary plain language. The word, "such" means, "of that kind ; of the same or like kind." The word, "such" always refers to something else and it generally and naturally refers to its last antecedent. Lord Halsbury L.C., in Ex parte *George Staplyton Barnes* [2] stated that the word, "such" referred to the last preceding provision.

12. In *Commissioner of Income-tax, Punjab, Himachal Pradesh and Bilaspur, Simla* v. *Jagan Nath Maheshwary* [1] the High Court of Punjab observed:

> "In its grammatical usage, and in its natural and ordinary sense, the word 'such' is understood to refer to the last antecedent, unless the meaning of the sentence would thereby be impaired, which does not seem to be the case here. The word 'such' indicates something just before specified, or spoken of, that is proximalely, and not merely previously. It particularises that immediately preceding antecedent, and not everything that has gone before. It signifies what has preceded proximately and not just previously or formerly."

Thus, it is clear that the expression, "such revocation or renunciation" occurring in section 206 will refer only to the "revocation and renunciation" dealt with in section 205.

13. This conclusion of mine gets confirmed from certain other features also. I have already referred to section 201 which dealt with the termination of agency in general and enumerated the methods in which such termination can be brought about, two of them being revocation and renunciation. Sections 203 and 204 deal with revocation and they do not deal with renunciation. The only section, preceding Section 206, which deals with revocation and renunciation together and as a matter of fact uses the expression, "revocation or renunciation" in the section itself, is section 205. Therefore the expression "such revocation or renunciation" occurring in section 206 must really relate back to section 205 and to no other section. secondly, if the argument of the learned counsel for the respondent is to be accepted the word, 'such' in section 206 will have no meaning whatever. It is one of the cardinal principles of interpretation that no word used by the Legislature in a statute should be ignored or should be held to be meaningless, superfluous or otiose, unless the Court is driven to such a conclusion, having regard to the scheme, object and other relevant circumstances of the statutory provision. In this context

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1. A.I.R. 1931. Cal. 676.
2. 1896 A.C. 146.

1. (1957) 32 I.T.R. 418 at p. 431: A.I.R. 1957 Punj. 226.

there is absolutely nothing warranting the conclusion that the word "such" in section 206 is superfluous or otiose. By giving the word "such" the normal and natural meaning as referred to above, the section is clearly intelligible and there is no difficulty in working or applying that section. Simply because, if the word, "such" is given its due meaning, the section will have one effect and if the word, "such" is held to be superfluous or otiose, it will have another effect, the Courts cannot refuse to give the word its normal and ordinary meaning and hold that it is superfluous or otiose, particularly when the giving of such normal and ordinary meaning to the word, 'such' does not being about any absurdity It is a well-known rule of construction that if there is nothing to modify or qualify a language which a statute contains, it must be construed in the ordinary and natural meaning of the words it contains. Therefore, I am unable to accept the contention of the learned counsel for the respondent which will have the effect of ignoring the word, "such" occurring in section 206 or holding that the said word is superfluous or otiose.

14. There is yet another ground for holding that the contention of the learned counsel for the respondent is not sound. I have already extracted section 207. That section uses the expression, "revocation and renunciation" without any adjective before the same. That section states that revocation and renunciation may be expressed or may be implied in the conduct of the principal or agent respectively. Thus, on the face of it, the provision contained in the section is general and it applies to all ..revocations and renunciations of agency dealt with by the Act. Contrasting the language of section 206 with the language of section 207, it is clear that the Legislature itself did not intend section 206 to apply to every revocation and renunciation of agency dealt with by the Act and if that was the intention of the Legislature, it would not have used the word, "such" in section 205 and it would have used the language of section 207 by providing, "reasonable notice must be given of revocation or renunciation." This is yet another circumstance for holding that the Legislature intended section 206 to apply to revocation and renunciation contemplated in section 205 of the Act.

15. On such a construction, the combined effect of sections 205 and 206 will be as follows:

1. Where there is an express or implied contract that the agency should be continued for any period of time, the previous revocation or renunciation by the principal or the agent will render him liable to pay compensation to the other party.

2. If such previous revocation or renunciation is for a sufficient cause then the liability to pay compensation will not arise.

3. If the principal wants to revoke the agency or the agent wants to renounce the authority before the expiry of the period prescribed and there is no sufficient cause for such revocation or renunciation, the principal or the agent, as the case may be, shall give reasonable notice of such revocation or renunciation to the other party.

4. If no such reasonable notice is given, then the principal or the agent, as the case may be, will have to make good the damage resulting to the other by such previous revocation or renunciation.

16. The above construction of mine of sections 205 and 206 of the Act is not opposed to any principle or authority. It has always been held that an agency being one based on mutual trust and confidence should be revocable and terminable and there can be no question of permanency with regard to a contract of agency. The only question that may arise for consideration will be, if a contract of agency is terminated by either of the parties to the same, does such termination give rise to any right in favour of one party against the other party so terminating the contract of agency.

17. As early as 1873, James, L.J. said in *Llanelly Railway and Book Company* v. *London and North-Western Railway Company*[1]:

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1. (1873) 8 Ch. A. 942 at pp. 949-950.

"I start with this proposition, that *prima facie* every contract is permanent and irrevocable, and that it lies upon a person who says that it is revocable or determinable to show either some expression in the contract itself, or something in the nature of the contract, from which it is reasonably to be implied that it was not intended to be permanent and perpetual, but was to be in some way or other subject to determination. No doubt there are a great many contracts of that kind ; a contract of partnership, a contract of master and servant, a contract of principal and agent, a contract of employer and employed in various modes—all these are instances of contracts in which, from the nature of the case, we are obliged to consider that they were intended to be determinable. All the contracts, however, in which this has been held are, as far as I know, contracts, which involve more or less of trust and confidence, more or less of delegation of authority, more or less of the necessity of being mutually satisfied with each other's conduct, more or less of personal relations between the parties."

Thus, a contract of agency being one involving mutual trust and confidence is terminable.

18. The only question that may arise in this context is that if the parties themselves have prescribed a period for the continuance of the agency, whether the agency can be terminated before the expiry of the period so prescribed. It is that situation which has been dealt with in sections 205 and 206 of the Act, by providing that it can be terminated for a sufficient cause or on a reasonable notice. On the other hand, if no period is prescribed for the continuance of the agency, there is nothing to prevent either of them putting an end to the agency at any time, subject to the restrictions contained in sections 202 and 204 already referred to, on the right of the principal to revoke the agency. If the parties themselves want to avoid and provide for a safeguard against, abrupt or arbitrary termination of the relationship there is nothing to prevent them from contracting between themselves that the relationship would not be terminated until the expiry of a particular period. In such a situation, if the agency is terminated before the expiry of the prescribed period, the party guilty of such termination should be liable to pay damages to the other in the absence of sufficient cause or reasonable notice. Notwithstanding this facility available to the parties, if they do not contract to that effect and enter into a relationship of principal and agent without there being any fixed period for the continuance of such relationship, neither party can complain against the action of the other is terminating the relationship at any time he liked, subject of course, as I have pointed out already, to the restriction imposed on the principal's authority to revoke the agency under sections 202 and 204.

19. It will be now appropriate to refer to the decision of the High Court of Calcutta mentioned already, that is In re *Shaw Wallace & Co.*[1] That case arose out of a reference made under the Income-tax Act, 1922. The assessee, Messrs. Shaw Wallace & Co., were the distributing agents in India for the Burmah Oil Company and sole agents in India and Aden for the marketable products of the Anglo-Persian Oil Company. The assessees had at no time any formal agency agreement with either of the oil companies. The agency was transferred to some other body and the assessees were paid compensation for the termination of the agency. The question for consideration was, whether the compensation received by the assessees was in the nature of a capital receipt and therefore not 'income, profits or gains' while the meaning of the Income-tax Act. One of the arguments that was advanced before the Court was that it was an *ex-gratia payment* In considering that argument, the learned Chief Justice (Rankin, C.J.) referred to section 206 of the Indian Contract Act. For the purpose of understanding the context in which the reference was made, it is desirable to extract the entire paragraph in which

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1. A.I.R. 1931 Cal. 676.

the discussion occurs, which is as follows:

"We are only concerned with the legal rights of the parties in so far as they assist us to appreciate the nature or character of the receipt upon which it is claimed. If the parties make an amicable arrangement according to their own notions of what is fair or their own view of their legal rights, we are concerned merely to appreciate what their bargain or settlement was. If the principal really means to compensate the selling agent for a sudden "dismissal" or more properly a sudden determination of the agency it is only in very exceptional circumstances that anything is to be gained by considering whether the agent would have enforced a claim for damages and whether he could thereby have obtained the same amount. I see nothing is the facts of the present case to suggest that the large sums now in question were handed over to the assessees upon the footing that there was no real liability. The principals may have been generous and wisely generous in dealing with their obligations but talk of *exgratia* payment is singularly unimpressive in this case. I should be very much astonished to be told, and I should in any case require from the Commissioner a clear finding based upon proper evidence before I would accept it; that the agency of the assessees with their establishments all over India and elsewhere could be revoked suddenly without the principals becoming liable to indemnify their agents in respect of any obligations incurred by them in connexion with the discharge of the agency. Assuming that in English law there is no general doctrine that agents are entitled to notice before the agency is terminated by the principal, yet this rule is subject to exception arising from the particular circumstances of the case; and in India the matter has been dealt with by the Contract Act. Section 206 lays down: 'Reasonable notice must be given of such revocation or renunciation; otherwise the damage thereby resulting to the principal or the agent, as the case may be, must be made good to the one by the other.'

If the phrase 'such revocation or renunciation' is to be taken as referring back to section 205 I confess that I find no meaning in the section; and it is at least arguable that what the draftsman meant to say is that when there is no express or implied contract that the agency should continue for any fixed period reasonable notice must be given of the revocation or renunciation of the agency and, etc. The question of damages and the question of indemnity doubtless would overlap in the circumstances of these agencies, and in the case of the Burmah Oil Company we knew that the sum of Rs. 12 lakhs was in a sense to cover work done and to be done by the assessees until the new agent could take over completely."

From what I have, extracted above, it is clear that the interpretation of section 206 was not strictly relevant for the point to be considered in the reference made under the Indian Income-tax Act. Secondly, with very great respect to the learned Chief Justice, I am unable to agree that if the phrase, "such revocation or renunciation" occurring in section 206 of the Act is to be taken as referring back to section 205, there is no meaning in the section. I have already pointed out what the meaning of that section is, if the expression, "such revocation or renunciation" is to be taken as referring back to section 205 and I have also given reasons as to why the Court is not entitled to hold the word "such" as superfluous or otiose in section 206, which will be the result, if section 206 is held not to refer back to section 205.

20. For the above reasons, I held that the requirement of reasonable notice of revocation or renunciation contemplated by section 206 is applicable only to the 'previous revocation and renunciation' dealt with by section 205, that is, it is applicable only to agencies in which the parties have contracted either expressly

or by necessary implication that the agency should continue for a particular period of time and in this case admittedly there being no such contract, section 206 has no application and therefore the respondent is not entitled to a reasonable notice before the termination of the agency.

21. Mr. K.N. Balasubramaniam, learned counsel for the respondent, contended that on, the basis of the following observation of McNair, J., in *Martin—Baker Aircraft Company Limited and another v. Canadian Flight Equipment Limited*[1], the respondent is entitled to a reasonable notice.

> "If it were a pure agency agreement and nothing more, there is much to be said for the view that it would be determinable summarily at any moment. An agreement of this nature, however, has to be looked at as a whole and the whole of its contents considered, and if one finds (as one finds here) that the person who is a sole selling agent has to expend a great deal of time and money and is subject to restriction as to the sale of other persons', products which may be competitive, it seems to me that it is a form of agreement which falls much more closely within the analogy of the strict master and servant cases where, admittedly, the agreement is terminable by reasonable notice, though not determinable summarily except in the event of misconduct."

I am unable to hold that the above observation of the learned Judge is of any assistance to the respondent in the present case. The above statement proceeds on the basis of the relationship between the parties being more in the nature of master and servant than of principal and agent, and stress is laid on the existence of restriction imposed on the agent in dealing with the products of other persons. As far as the present case is concerned, by no stretch of imagination it can be contended that the relationship of the appellants and the respondent was in the nature of master and servant. I have already referred to the fact that the respondent even before he entered into the arrangement with the appellants was himself a wholesale dealer in plastic goods. Equally I have referred to the contention of the respondent himself that there was no understanding between the appellants and the respondent that he ought not to deal in the goods of other people. As a matter of fact, one of the grounds put forward by the appellants before the trial Court was that the respondent was dealing in the goods of other people, that that was the reason why he did not purchase goods sufficiently from the appellants and back sufficient orders for the goods of the appellants, and that the act of the respondent constituted a misconduct on his part entitling the appellants to terminate the agency. The respondent denied this claim of the appellants and the learned trial Judge himself has found that the respondent was not guilty of misconduct in dealing in the goods of other people, since there was no express restriction imposed on the respondent to that effect.

22. Apart from these features, there is another aspect of it to be taken note of. I have already referred to the terms for payment of commission to the respondent herein. These terms did not impose an obligation on the respondent to buy goods from the appellants or to book orders for the goods of the appellants. If the respondent bought goods from the appellants or booked orders for the goods of the appellants, he was entitled to commission on the basis of the value of the goods. But if he did not buy any goods or did not book any order, he would not be entitled to any commission and there was no penalty attached in this behalf. When the revised terms were brought into force by Exhibit A.-44 dated 27th February, 1964, the respondent became entitled to an additional commission of 1-1/4 per cent. over and above 6-1/4 per cent by way of target commission, if the respondent's annual turnover exceeded a particular limit. On the other hand, there was no arrangement that the respondent should do any minimum business with the appellants to earn commission. Thus, there was no obligation at all on the part of the respondent to buy goods from the appellants

1. (1955) 2 All E.R. 722 at p. 735.

or to book orders for the goods of the appellants. Under such circumstances, it cannot be held that the relationship between the appellants and the respondent was that of master and servant so as to attract the observations of Mc Nair, J., quoted already.

23. In this context, the following observations of Peterson, J., in *Levy* v. *Goldhill*[1], will be relevant:

> "The plaintiff's second claim in the present action, is for damages for wrongful dismissal on the ground that he was entitled to reasonable notice, It was not attempted to prove a custom of the trade, but it was said that the plaintiff was entitled to reasonable notice. Now in this case there was in my opinion no employment in the strict sense of the term. The plaintiff was not the servant in any way of the defendant; he was not bound to do any work whatever. The agreement merely provided that, if the plaintiff introduced customers and if the orders were accepted by the defendant then the plaintiff should be entitled to half of any profits which were derived from those orders. There was no obligation on the part of the plaintiff to do work for the defendant, nor was there any obligation on the part of the defendant to provide work for the plaintiff, but there was merely a provision that the defendant would in a certain event pay certain remuneation to the plaintiff."

Under these circumstances, I hold that the conclusion of the learned Principal Judge, City Civil Court, Madras, that the respondent was entitled to a reasonable notice of four months and on that account was entitled to a compensation of Rs. 16,000 for the notice period is not correct. It the respondent was not entitled to the said sum of Rs. 16,000 under the head referred to above, the respondent himself admittedly owing a sum of Rs. 13,432-41 to the appellants as against the sum of Rs. 6,250 due by the appellants to the respondent, the respondent will not be entitled to any decree in the present suit. Hence, the appeal is allowed and the judgment and decree of the learned Principal Judge, City Civil Court, Madras, in so far as he decreed the suit of the respondent against the appellants for a sum of Rs. 8,817-‾9, are set aside. Having regard to the nature of the question raised and discussed by me above, admittedly there being no decision of any High Court on the point, I do not make any order as to costs either here or in the trial court.

S.J. — *Appeal allowed*

[FULL BENCH]

HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P. S. Kailasam, B. S. Somasundaram and A. Varadarajan, JJ.*

In re, **Sorna Velayutham Pillai and others** .. *Petitioners**

(*A*) *Penal Code* (*XLV of* 1860), *sections* 34, 100, 302 *and* 324—*Attack by more than one person—Death of victim—Common intention to cause death alleged—Nature of proof needed—Evidence—Intention to cause injury—Whether sufficient to prove intention to cause death.*

(*B*) *Madras High Court Appellate Side Rules, rule* 6—*Direction by Chief Justice to post case before Full Bench—Effect.*

(*C*) *Criminal Procedure Code,* 1973 (*II of* 1974), *section* 484—*Reference by a Division Bench to Full Bench—Validity—Whether can be questioned.*

Per *Venkataraman, J.* (in his Order of Reference to Full Bench)—Since it is the prosecution that wants the Court to convict the accused for the offence of murder by invoking section 34 of the Indian Penal Code, it is for the prosecution to prove the common intention beyond reasonable doubt and it is more so particularly where there is no direct evidence of common intention and it is only a matter of inference from the circumstances.

[*Para.* 32.]

If the common intention was only to cause simple hurt, it would only be an

1. (1917) 2 Ch. 297.

*Cr.A.No. 524 of 1973. *5th August,* 1974.

offence under section 324 read with section 34, Indian Penal Code.

Per *K. N. Mudaliyar, J.* (differing from *Venkataraman, J.*) Under clause 3 of section 300 in particular, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. When section 34 speaks of a criminal act, it embraces all the series of acts by which the injury was inflicted. This is clear from a reading of section 33 and section 34. In order to invoke section 34 what must be determined is whether all the injuries taken cumulatively were inflicted in further of a common intention at all.

[*Para.* 56.]

Per *Kailasam, J.*, on behalf of the Full Bench. Regarding the question of the validity of the Reference to the Full Bench and that it was not in accordance with section 434, Criminal Procedure Code, it is unnecessary to go into it for the learned Chief Justice, after consideration of the earlier matter has directed the appeal to be heard by a Full Bench. The validity of the order of the learned Chief Justice cannot be questioned, for, under rule 6, of the Appellate Side Rules, High Court, Madras, notwithstanding anything contained in the rules the Chief Justice may direct that any application, petition, suit, appeal or reference, shall be heard by a Full Bench as defined in these Rules. The order of the learned Chief Justice puts an end to the doubts expressed at the bar. There could be no valid objection to the Full Bench dealing with the appeal.

[*Para* 65.]

Held further, on a careful consideration of the entire evidence the Bench was not satisfied that accused 2 and accused 3 shared a common intention to cause the death of the deceased. On the other hand they took part in the attack and caused simple injuries with dangerous weapons to the deceased, as well as P.W. 1 and they would be guilty of an offence under section 324, Indian Penal Code, for injuries caused to the deceased. The first accused will be guilty of an offence under section 324 for causing hurt to P.W. 1 and the sentence of two years rigorous imprisonment is confirmed. Regarding the injuries caused to the deceased, accused 2 and 3 will be sentenced under section 324, Indian Penal Code, to rigorous imprisonment for three years. So far as injury to P.W. 1 is concerned the conviction of the first two accused under sections 323 and 324 is confirmed.

[*Para.* 68.]

Cases referred to :—

Mahbub Shah v. *King Emperor*, (1945) 2 M.L.J. 144 (P.C.): L. R. 72 I.A. 148: A.I.R. 1945 P.C. 118; *Pandurang* v. *State of Hyderabad*, (1955) 1 S.C.R. 1083: 1955 S.C.J. 106: A.I.R. 1955 S.C. 216; *Amrik Singh* v. *State of Punjab*, C.A. No. 62 of 1969 *dated* 17th December, 1971; *Devilal* v. *State of Rajasthan*, 1971 Crl. L.J. 1132: A.I.R. 1971 S.C. 1444; *Sri Krishan* v. *State of Uttar Pradesh*, (1973) 1 S.C.R. 734: A.I.R. 1972 S.C. 2056; *Satrughan Patar* v. *Emperor*, 20 Crl. L.J. 289 : A.I.R. 1919 Pat. 111: *Fateh Khan* v. *Emperor*, A.I.R. 1930 Lah. 950; *Barendra Kumar* v. *King Emperor*, L R. 52 I.A. 40: 48 M.L.J. 543: A.I.R. 1925 P.C. 1; *Karnail Singh* v. *State of Punjab*. 1954 S.C.R. 904: 1954 S.C.J. 269: A.I.R. 1954 S.C. 204; *Mathuralal Adhi Reddy* v. *State of Hyderabad*, A.I.R. 1954 S.C. 177; *Wazir Singh* v. *State of Punjab*, A.I.R. 1956 S.C. 754; *Ram Chandra* v. *State of Uttar Pradesh*, A.I.R. 1957 S.C. 381; *Bharwad Mepa Dena* v. *State of Bombay*, (1960) 2 S.C.R. 172 : 1960 S.C.J. 478; A.I.R. 1960 S.C. 289 ; *Periaswamy* v. *State*, (1960) M.W.N. (Crl.) 130; *State of Rajasthan* v. *Kartar Singh*, (1971) 1 S.C.J. 165 : (1971) M.L.J. (Crl.) 113: A.I.R. 1970 S.C. 1305; *Hethubha* v. *State of Gujarat*, (1971) L.W. (Crl.) 245 : (1970) 2 S.C.J. 635: A.I.R. 1970 S.C. 1266 ; *Thangaraj In re*, (1972) L.W. (Crl.) 170; *Ram Tahal* v. *State of Uttar Pradesh*, (1973) L.W. (Crl.) 110; *Chikkaranga Gowda* v. *State of Mysore*, A.I.R. 1956 S.C. 731; *Sheoram Singh* v. *State of Uttar Pradesh*, (1973) 3 S.C.C. 110: A.I.R. 1972 S.C. 2555 ; *Afrahim Sheik* v. *State of West Bengal*, (1964) 2 Crl.L.J. 350 : A.I.R. 1964 S.C. 1263; *Nagappan* v. *The State of Tamil Nadu*, R.T. No. 86 of 1969; *Nachimuthu Goundan, In re*, I.L.R. (1947) Mad. 425;

(1946) 2 M.L.J. 137: A.I.R. 1947 Mad. 259; *Kripal* v. *State of U.P.*, A.I.R. 1954 S.C. 706; *Dilip Singh* v. *State of Punjab*, 1953 S.C J. 532: 1954 S.C.R. 145 : A.I.R. 1953 S.C. 364; *Gaya Prasad* v. *State of Maharashtra*, A.I.R. 1971 S.C. 1112; *Ram Lal* v. *Delhi Administration*, (1973) 1 S.C.W.R. 179 : A.I.R. 1972 S.C. 2462; *Karivadai* alias *Periaswamy*, In re, (1972) L.W. (Crl.) (S.N.) 14; *State* v. *Karuppanna Thevar*, (1972) 1 M.L.J. 26; *R.* v. *Sabed Ali*, 11 Beng.L.R. 359; *Tokendra Bir Singh* v. *Govt. of India*, (1965) 1 S.C.J. 273: A.I.R. 1964 S.C. 1663.

The judgment of the Sessions Judge of the Court of Sessions of the Tirunelveli Division at Tirunelveli in Case No. 30 of 1973.

This appeal first came on for hearing before the Bench (*Venkataraman* and *K. N. Mudaliyar, JJ.*)

N. T. Vanamamalai, for Appellant.

Public Prosecutor, for State.

The following Judgment were delivered by

Venkataraman, J.—This is an appeal by the three accused who were tried by the learned Sessions Judge of Tirunelveli, in connection with an occurrence in the course of which one Arunachalam Pillai was murdered, and his father-in-law (P.W. 1) was injured. The occurrence is alleged to have taken place at about 3 P.M. on 29th July, 1972 (Saturday) within the limits of Pattalurani Village. Accused 2 and 3 are the sons of the first accused. Accused 1 and 3 are residents of Pattalurani Village. The second accused was employed in the Police Department in Bhopal and had come down on leave.

2. P.W. 1 is the father of P.W. 3 Andaperumalammal. Arunachalam Pillai (murdered person) and P.W. 3 were married about eleven years before. Arunachalam Pillai was employed in the Malaria Office in Tuticorin, about fifteen miles away and was residing there while his wife, P W. 3 was residing in Pattalurani village in a house belonging to her father (P W. 1). The house of the three accused is next east of that house. P.W. 1 was living in another house in the southern part of the village. About four and a half months before the occurrence, there was a quarrel between P.W. 3 on the one hand and accused 1 and 3, the wife of the first accused and he daughter of the first accused on the other on the allegation that sullage water ran from the house of P.W. 3 to the front of the house of the accused. The four persons averred that P.W. 3 had let out the water purposely and beat her. She gave a complaint to the Police at Pudukottai. P.W. 9, the then Sub-Inspector filed a charge-sheet (Exhibit P. 16) against the four persons in the Court of the Honorary First Class Magistrate, Tuticorin. They were convicted. Exhibit P-17 dated 22nd March, 1972 is the judgment. It shows that accused 1 and 3 were fined Rs. 20 each and the wife and daughter of the first accused were fined Rs. 15 each.

3. P.W. 3 says that the four persons were creating trouble to her by uttering threats and inviting her to quarrel. She gave a notice, Exhibit P-5, dated 15th April, 1972 through a lawyer (P.W. 5) to the said four persons claiming a sum of Rs. 250 as damages for the the hurt and insult caused to her by the said four persons. P.W. 3 would say that thereafter the first accused was threatening that on the arrival of the second accused, he would exterminate her family.

4. P.W. 3 proceeding states that the second accused came on leave to the village on 28th July, 1972. He came to her house and abused her. Out of fear she went to her father's residence. When she was there, about 10-30 P.M. the three accused came to the house of P.W. 1 (and this is also spoken to by P.W. 1) and said:

> "You have given notice claiming damages for the loss of the honour of P.W. 3. We shall not leave without cutting you."

The neighbours, including P.W. 6, pacified them, and the accused went away. P.W. 6 merely says that accused 1 to 3 were talking loudly and he does not speak to the threat of the accused.

5. In view of the above quarrel P.W. 1 went in the morning on 29th July, 1972 and brought in his son-in-law, Arunachalam Pillai from Tuticorin to the

village. They came in a bus and got down at the bus stop near their village. They had to proceed in the northern direction; their village was about seven furlongs north of the bus stop.

6. At the bus stop, Muthia Pillai (P.W. 2), one Perumal Pillai (not examined) and the third accused were there. P.W. 2 was a teacher in Anjaperunallur School about three miles away from the bus stop. Because it was Saturday the school had closed at 1 P.M. He came by walk to Pattulurani. He reached the bus stand about 2-15 P.M., and because it was hot, he stood there for a while under the shade of a tree. He found the third accused and Perumal Pillai (not examined) standing there already. He further says that within a few minutes of his reaching the bus stop, P.W. 1, and his son-in-law, Arunachalam Pillai, came there by bus from Tuticorin.

7. The evidence of P.Ws. 1 and 2 is that, on seeing the third accused, Arunachalam questioned him why the previous night he had tried to attack his father-in-law and suggested to him that he could go over to the village where they could talk it over. P.W. 1 says that the third accused retorted: "You come to the village. We shall commit murder". So saying, the third accused went away northwards. P.W. 2, however, merely says that there was an exchange of words between the third accused and Arunachalam Pillai. He does not say that the third accused uttered a threat of murder.

8. P.W. 1, his son-in-law Arunachalam Pillai, P.W. 2 and Perumal Pillai stood under the shade of a tree in the bus stop for about quarter of an hour after the third accused had left, and then they proceeded towards Pattulurani. After going some distance northwards, Perumal Pillai went straight north on the regular road (see also the sketch Exhibit P. 25), while P.W. 1, Arunachalam Pillai and P.W.2 took a short cut which branches off north-eastwards at a particular point. The short-cut was a narrow path. After proceeding for about three-fourths furlong on that short-cut, they saw the three accused hiding themselves in the dry filed of Senthattia Pillai on the west. The first accused (who was a dismissed Police Constable) had a lathi in his right hand and a bichuva, (M.O. 1), on the right side of his waist The second accused had an aruval. The third accused had a pen knife. P.W. 2 was proceeding first; behind him there was P.W. 1, and behind him there was Arunachalam Pillai. The first accused gave a blow with his lathi on the head and left flank of P.W. 1. Arunachalam intervened. The first accused gave a blow with the lathi on the head of Arunachalam. Arunachalam wrested the lathi from the first accused and gave a blow with it on the head of the first accused, as a result of which the lathi broke into two pieces. M.O. 2 is the larger portion and the smaller broken portion is M.O. 7.

9. When Arunachalam dealt that blow on the head of the first accused, the second accused gave a cut with his aruval on the head of Arunachalam. P.W. 1 tried to prevent it. At that juncture the second accused gave cuts to P.W. 1 with the aruval on his head and right palm. The first accused (who had been beaten on the head by Arunachalam) stabbed Arunachalam on the right chest and left chest, with the bichuva (M.O. 1). On receiving the stabs Arunachalam ran south crying, "He has stabbed". He ran about 8 yards and fell down, face downwards. P.W. 1 also ran south. His dhoti (M.O. 3) got stuck up in the thorns by the side of the foot path. Hence he discarded the dhoti and ran south clad only in his towel. At that juncture the third accused gave a stab with the pen-knife on the back of Arunachalam who had already fallen down. P.W. 2 was entreating the accused not to indulge in violence, but the accused did not heed him. The accused then ran away.

10. The accused went near Arunachalam, but found that life was extinct. Leaving P.W. 2 at the spot, P.W. 1 went to report the matter to P.W. 7 the Village Headman living in Naickenpatti about a mile away from the scene of occurrence. P.W. 7 says that P.W. 1 came to him and reported the matter at 4 P.M. Taking his Thalayari, he went to the scene with P.W. 1. He saw the corpse. He recorded a statement (Exhibit P-1) from P.W. 1 at the spot,

P.W. 2 attested it. Exhibit P-1 contains a full account of the present prosecution version.

11. P.W. 7 prepared his covering reports, Exhibits P-6 and P-7, and also a copy of Exhibit P-1, *viz.*, Exhibit P-8. He sent Exhibits P-1 and P-6 to the Pudukottai Police Station and Exhibits P-7 and P-8 to the Sub-Magistrate at Tuticorin, through his Thalayari, Subbiah Naicker, P.W. 7 remained at the spot.

12. P.W. 12, the Sub-Inspector of Police, Pudukottai Police Station, says that the Thalayari brought Exhibits P-1 and P-6 at 8-30 P.M. P.W. 1 also had come with him. P.W. 1 had injuries. P.W. 12 registered a case of murder (Exhibit P-22) and sent express reports to his superiors. He sent P.W. 1 to the Government Hospital at Tuticorin with a memo (Exhibit P-23) for examination and treatment.

13. P.W. 1 seems to have been examined by Dr. Balasubramaniam at 11-50 P.M. He was not available for examination in Court, because he had gone to the United Kingdom. The wound certificate issued by him has been marked as Exhibit P-4 through another doctor, P.W. 4, who knows the handwriting of Dr. Balasubramaniam. The document can be admitted under section 32 (2) of the Evidence Act, if it can be said that it was memorandum made by the doctor, in the discharge of his professional duty and since the injuries are noted even in the accident register maintained for the purpose, and Exhibit P-4 is only a copy thereof, it would be admissible. But even if it is not admitted, it does not matter, because the evidence of P.Ws. 1 and 2 shows that P.W. 1 sustained Injuries. Actually, Exhibit P-4 mentions the following injuries.

1. Incised wound 2″ × ¼″ scalp deep on the front of forehead region.

2. Incised wound 2½″× ¼″ scalp deep on the back of right side scalp.

3. Incised wound on the ball of right thumb 2″ × ¼″ muscle deep.

4. Diffused contusion left chest.

According to the prosecution, injuries Nos.1 and 4 were caused by the first accused with the lathi, and injuries Nos. 2 and 3 by the second accused with his aruval.

14. P.W. 12, after registering the case left the station at 10 P.M. and reached the scene of occurrence at about 11 P.M. P. W. 13 the Inspector of Police received the copy of the first information report at Pudukottai at 10-30 P.M. He reached the scene at 11-30 P.M. He took P.W. 7 and proceeded to Perumalnaicker, Oorani, north-west of Pattaluranii) and arrested the first accused. He questioned the first accused. The first accused made a statement in the course of which he stated that he had buried the knife on the tank bund of Pottal Kulam. Exhibit P.9 is the relevant portion. R. 15. P.W. 13 came to the scene of occurrence and prepared an observation mahazar; Exhibit 10.

15. Item No. 2 therein refers to a small broken end of a lathi with a ferrule. It was by the right side of the corpse. Item No. 3 therein is the other broken lathi about twenty feet north of the corpse. Item No. 5 therein refers to drop of blood on the cart-track for that distance of seven feet. Item No. 6 therein refers to the eight-cubit dhoti (M.O. 3) in the thorns on the eastern side of the footpath. That has been identified by P.W. 1 as his dhoti. Item No. 7 was a pair of chappals (M.O. 5 series) belonging to the deceased. Item No. 8 was a pair of chappals belonging to P.W. 1.

16. Exhibit P-1 further states that items 2 and 3 were placed together and found to be parts of the same stick which had recently broken. M.O. 2 is the larger piece and M.O. 7 is the broken end.

17. P.W. 13 then held the inquest from 1 A.M. to 4 A.M. on 30th July, 1972. He examined P.Ws. 2, 3, 6 and others and the first accused. He had sent the corpse for autopsy. He recovered M.Os. 2, 3 and 5 to 8 at the scene under a mahazar Exhibit P-12. In pursuance of the information given in Exhibit P-9 the first accused took him and others to the northern bund of Pottal Kulam

Tank and from the eastern extremity took out the blood stained bichuva (M.O. 1) which he seized under Exhibit P-13.

18. He then searched the house of the first accused and recovered, *inter alia*, Exhibits P-5 and P-14.

19. Exhibit P-14 is a letter alleged to have been written by the second accused from Bhopal to his brother the third accused, and his mother, at Pottal Kulam. P.W. 8, the President of the Panchayat of Ellanaickenpatti, residing at Pattalurani, says that he is familiar with the handwriting of the second accused and he identifies the handwriting of the second accused in Exhibit P-14. The prosecution relies on the last portion of the letter, wherein, he says:

> "I am always prepared to sacrifice my life for the sake of you who brought me up. I shall come soon to wipe out your tears. Don't be anxious. I shall come on 27th July, 1972 or 28th July, 1972. I shall definitely come".

This last portion is said to refer to P.W. 3 and may be translated thus:

> "Tell the barren woman Andal (P.W. 3) that your son would be coming to give her the boon of a son. I think that God has willed it that I should make her pregnant and beget a son which she wants.
>
> As though the trials of destiny and God are not enough, mankind is also testing us. Destruction is its end. Rest in person".

20. The post-mortem examination on the corpse of Arunachalam was conducted by Dr. Sundaram (P.W. 4) at 11-30 A.M. on 30th July, 1972. He found the following injuries:

> 1. Incised wound 2 1/2" X 3/4th" in the left parietal region of a scalp close to midline bone deep. On dissection there was no fracture of the skull.
>
> 2. Punctured wound 1"× 1/2" on the right side of back along the medial margin of right scapula.
>
> On dissection 1" deep echymosis in the underlying tissues was seen.
>
> 3. Punctured wound 1" × 3/4" just below the right nipple 1" lateral to the right nipple. On dissection......
>
> There was a punctured wound in the fourth right intercostal space corresponding to the external wound. There was a punctural penetrating wound on the right, middle lobe of lung 1" in diameter, depth 2".
>
> 4. Punctured wound 1" × 1/2" in diameter, 3" above the left nipple.
>
> On dissection echymosis in the underlying tissues. There was a punctured wound in the third left intercostal space corresponding to the external wound. There was a punctural penetrating wound on the anterior surface of the left lung. Upper lobe 1" × 1/2" × 1½" depth extending on to the anterior surface entering right ventricular cavity of the heart.

Injury No. 3 was necessarily fatal, and so also was injury No. 4. Injuries Nos. 1 and 2 were simple. Injury No. 1 could have been caused with an aruval. Injury No. 2 could have been caused with a pen knife, and injuries Nos. 3 and 4 could have been caused with a bichuva like M.O. 1.

21. According to the prosecution, injury No. 1 was caused by the second accused with the aruval. Injury No. 2 was caused by the third accused with the pen knife; and the injuries Nos. 3 and 4 were caused by the first accused with the bichuva (M.O. 1).

22. P.W. 4 examined the first accused about 9 A.M. on 31st July, 1972 and found on him a linear incised wound in the scalp in the centre 1½"× ½"×¼". Exhibit P-3 is the wound certificate. He supports the allegation of the prosecution that it could have been caused by a blow with a lathi about 3 P.M. on 29th July, 1972 but he adds that the first accused told him that the injury was caused to him on account of his being beaten with a leather belt on 29th July, 1972. In cross-examination the doctor says that the injury could also have been caused by a sharp-edged weapon.

23. The evidence of P.W. 11 the Head Clerk of the Sub-Magistrate's Court shows that M.Os. 1 and 8 to 11 were sent for chemical examination and that human blood was found in each of these items.

24. The Inspector says that accused 2 and 3 were absconding. Later the second accused was arrested at Bhopal and the third accused surrendered before the Sub-Magistrate, Tuticorin on 1st August, 1972.

25. In the committal Court the first accused denied that he quarrelled with P.W. 1 on 28th July, 1972. Regarding the incident on 29th July, 1972 he stated that he alone was there. Accused 2 and 3 were not there. He was cutting thorns for fencing his garden. At that time Arunachalam came suddenly and gave a cut forcibly with an aruval on the first accused. He aimed a second cut which the first accused warded off with his lathi as a result of which the lathi broke. Arunachalam came to cut him a third time. The first accused became afraid that Arunachalam might kill him and in self-defence he stabbed Arunachalam with his pen-knife.

26. The second accused also denied the quarrel with P.W. 1 on the night of 28th July, 1972. He stated that he came to Pattulurani only about 9-15 P.M. on 28th July, 1972 and left the village at 8 A.M. the next day for Rajapalayam and other places to see his relatives. He had been on leave only for fourteen days and six days had to be spent in travel to and fro.

27. The third accused completely denied the evidence.

28. In the Court of Session the first accused adhered to his previous statement and added that at 4-30 P.M. on 29th July, 1972 he himself went to the house of the village Headman (P.W. 7) and complained that Arunachalam had cut him on the head. P.W. 7 immediately took him to the Police Station.

29. The second accused while sticking to his statement in the Committal Court, admitted that Exhibit P-14 was written and signed by him but he denied that P.W. 8 knew his handwriting. The third accused stuck to his denial in the Committal Court. The accused did not adduce any defence evidence.

30. The learned Sessions Judge accepted the prosecution case, rejected the defence and convicted the first accused of the murder of Arunachalam on the first charge under section 302 of the Indian Penal Code, and sentenced him to imprisonment for life. He convicted accused 2 and 3 under section 302 read with section 34 of the Indian Penal Code, for the murder of Arunachalam on the second charge and sentenced them to imprisonment for life. On the third charge he convicted the first accused under section 323 of the Indian Penal Code, for causing hurt to P.W. 1 (by beating him with a lathi) and sentenced him to rigorous imprisonment for one year. On the fourth charge he convicted the second accused under section 324 of the Indian Penal Code, for causing hurt to P.W. 1 with an aruval and sentenced him to rigorous imprisonment for two years the sentences to run concurrently.

31. Before us, Thiru N.T. Vanamamalai, learned counsel for the appellants contended for the defence, in particular he contended that the injury on the head of the first accused was an incised injury and should have been caused only with an aruval and that we could not accept the prosecution case that it was caused by Arunachalam wresting the lathi from the first accused and giving a blow with it on his head. I may at once say that the defence cannot be accepted and that subject to the question whether accused 2 and 3 can be convicted on the second charge under section 302 read with section 34 of Indian Penal Code, the prosecution evidence must be subtantially accepted. P.Ws. 1 and 2 have given consistent evidence about the occurrence. P.W. 2 is a disinterested witness. The present prosecution version was put forth in Exhibit P-1 without any delay. P.W. 2 has attested it. There is no reason to doubt the evidence of P.W. 7 that P.W. 1 came and reported the matter to him at 4 P.M. and that he went to the scene and recorded Exhibit P-1 at 5 P.M. He had denied the suggestion of the first accused that the first accused

came to his house and took him to the scene of occurrence. P.W. 12 has also denied the suggestion that Exhibit P-1 was prepared at the Police Station. If the first accused alone was there and accused 2 and 3 were not there, it is difficult to imagine that a lengthy report like Exhibit P-1 was prepared in such a short time implicating accused 2 and 3 and concocting a story merely from imagination. The injuries found on the person of Arunachalam by the doctor and the injuries found on P.W. 1 by Dr. Balasubramaniam and on the first accused by P.W. 4 also fit in with the prosecution case. In particular, I am satisfied that the injury on the head of the first accused was caused only by Arunachalam wresting the lathi (M.O.2) from the hands of the first accused and giving a blow with it on his head. Because it was on the head where the skin was taut the blow with the lathi might have caused an incised looking injury and the doctor might have described it as an incised wound. It is noteworthy that the doctor says that it could have been caused with a lathi. It is also not without significance that the first accused told the doctor that the injury was caused by a leather belt and not by an aruval as alleged later in Court. Thiru Vanamamalai, however, relies on the endorsement Exhibit D-2 of the Sub-Magistrate to whom the first accused was sent for remand on 1st July, 1972 at 11 A.M. The endorsement reads:

> "Accused produced at 11 A.M. No complaint of ill-treatment by police. The accused having a bandage to his head. He states that he was cut with an aruval by Arunachalam Pillai."

The learned counsel argues that if at 11A.M. on 31st July, 1972 the first accused had told the Magistrate that the injury on his head had been caused with an aruval it was unlikely that at 9 A.M. on 31st July, 1972 he told the doctor that the injury was caused by a blow with a leather belt. However there is no reason to disbelieve the evidence of P.W.4. We cannot exclude the possibility of the first accused having given two inconsistent versions, one to the doctor and another to the Sub-Magistrate because neither of them was true and the truth was that the injury had been caused by a blow with a lathi.

32. Further if the deceased was armed with an aruval and aimed it at the first accused the probabilities are that he would have succeeded in inflicting more serious injuries on the first accused than the single simple injury which was found on his head and he would not have allowed himself to be worsted by the first accused. Altogether, I am satisfied that the case of the prosecution is true and that the sequence of events of the occurrence was as summarised already. The first accused would clearly be liable for murder and under section 302 of the Indian Penal Code, on the first charge for the two stabs which he inflicted on Arunachalam (injuries Nos. 3 and 4 in the post-mortem certificate). Similarly on the third charge the first accused would clearly be guilty under section 323 of the Indian Penal Code, for the simple hurt which he caused to P.W. 1 by beating with a lathi (injuries Nos. 1 and 4 in the wound certificate Exhibit P-4). Similarly on the fourth charge the second accused would be guilty under section 324 of the Indian Penal Code, for causing simple hurt to P.W. 1 with an aruval (injuries Nos. 2 and 3 in the wound certificate Exhibit P-4). There remains the second charge under section 302 read with section 34 of the Indian Penal Code, against accused 2 and 3. It reads:

> "That you accused 2 and 3 at the same time and place and in the course of the same transaction in furtherance of the common intention you have formed along with accused 1 in causing the death of Arunachalam Pillai you accused 2 and 3 caused injuries to the said Arunachalam Pillai by you accused 2 cutting him with an aruval and you accused 3 by stabbing him with a pen-knife when accused 1 stabbed him with a pen-knife (as mentioned in charge 1 supra) in furtherance of the said common intention and you thereby committed an offence punishable under section 302 read with section 34 of the Indian Penal Code, and within my cognizance."

On this charge the second accused would certainly be guilty under section 324 of the Indian Penal Code for his individual act of causing an incised injury (No. 1 in the post mortem certificate) on the head of Arunachalam Pillai with an aruval. Similarly the third accused would certainly be guilty under section 324 of the Indian Penal Code, for the simple injury which he caused on the back of Arunachalam with a pen-knife (injury No. 2 in the post mortem certificate). But the all-important question is whether accused 2 and 3 or either of them can be convicted under section 302 read with section 34 of the Indian Penal Code. On this question a number of decisions have been cited before us on either side of the line in some of which section 34 has been held to apply and in some others it has been held not to apply. But it is unnecessary to refer to them in detail because in the last resort the answer to the question must depend upon the facts and circumstaces of this particular case. One thing however is clear that since it is the prosecution who wants the Court to convict Accused 2 and 3 for the offence of murder itself by invoking section 34 of the Indian Penal Code, it is for the prosecution to prove the common intention beyond reasonable doubt and it is more so particularly where there is no direct evidence of the common intention it is only a matter of inference from the circumstances. Examining the evidence from this point of view I feel that it cannot be said with reasonable certainty that accused 2 and 4 had necessarily a common intention with the first accused to murder Arunachalam Pillai. The most important evidence on this question must be the actual manner of the attack. It is necessary to recall the exact sequence of events. P.W. 12 was going in front. Behind him P.W. 1 was going, and behind him Arunachalam was going. Accused 1, 2 and 3 were waiting about twenty feet north of them. The first accused had a lathi in his right hand and a bichuva (M.O. 1) in the right side of his waist. The second accused had an aruval, and the third accused had a pen-knife. First accused dealt two blows on P. W. 1 with the lathi, one on his head and the other on his left flank. Arunachalam intervened. Thereupon, the first accused gave a blow on the head of Arunachalam with the lathi. Arunachalam wrested the lathi from the first accused and gave a blow with it on the head of the first accused. The lathi broke into two pieces M.Os.' 2 and 7.

33. The second accused gave a cut on the head of Arunachalam with his aruval P.W. 1 prevented it. The second accused gave cuts to P.W. 1 on his head and right palm. The first accused stabbed Arunachalam on the right side of his chest and the left side of his chest with M.O. 1. Upon receiving the stabs Arunachalam ran eight to ten yards southwards, crying. "He has stabbed," and then fell down face downwards. P.W. 1 also ran south. His dhoti (M.O.3) got stuck up in the thorns, discarding it, he ran south, clad in his towel. At that time, the third accused inflicted a stab on the back of Arunachalam with a penknife. The accused then ran away north-west with their weapons.

34. The question for determination is whether on the above evidence it can be said with certainly that accused 2 and 3 had the common intention to murder Arunachalam. It may be noted that it was P.W. 1 who was attacked first and not Arunachalam and even then the first accused gave a blow only with a lathi, which was not comparatively a deadly weapon. It was only when Arunachalam intervened that the first accused attacked Arunachalam, and even then, he only gave a blow with his lathi on the head of Arunachalam. He did not use the knife on Arunachalam immediately.

35. Further, the second accused chose to attack Arunachalam only after Arunachalam had given a blow on the head of the first accused with the lathi which he had wrested from the first accused. The second accused did not choose to attack Arunachalam earlier. Moreover, the second accused caused only a simple injury to Arunachalam. If he had any intention kill to Arunachalam he could easily have caused more serious and deadly cuts himself even at that stage. Instead, the second accused turned his attention to P.W. 1. I

was only after this that the first accused inflicted fatal stabs on Arunachalam. It is true that the third accused inflicted a stab even after Arunachalam had fallen down, but that was again a simple injury.

36. If accused 2 and 3 had any common intention to murder Arunachalam, they could have inflicted more serious injuries on Arunachalam who was absolutely at their mercy.

37. Further, there was no particular reason for murdering Arunachalam and allowing P.W 1 to escape. The evidence of P.Ws. 1, 3 and 6 shows that it was only with P.W. 1 that accused 1, 2 and 3 quarrelled on the preceding night 29th July, 1972 saying that he had issued a lawyer's notice claiming damages and that they would not leave without cutting him. Arunachalam himself was (sic) the man at the spot and was employed in Tuticorin. It is true that P.W. 5 says that he issued the notice (Exhibit P-5) on instructions from P.W. 3 and her husband, Arunachalam. But the notice was dated 15th April, 1972 and for over three months, the accused did not choose to cause any harm to Arunachalam. It is a fair inference in favour of the prosecution that after the second accused's visit to the village on short leave, the accused raised up the matter. But then, it was to P.W. 1 they went on the night of 28th July, 1972. P.W. 5 says that after his intervention the accused went away peacefully. No hurt was caused to P.W. 1 or to P.W. 3 on the night of 28th July, 1972. If we were to assume that accused 1, 2 and 3 had a common intention to murder Arunachalam, we must further assume logically that they had a common intention to murder P.W. 1 as well. yet they allowed P.W. 1 to escape. It should not have been a difficult matter for them to prevent P.W. 1 from escaping and to murder him. All these circumstances together suggest that they had been waiting there only to cause whatever hurt each could to P.W. 1, and to Arunachalam, if he intervened, and that the murder was unexpected. The evidence is quite consistent with this view. Even if we were to assume for the sake of argument, and argument alone, that two views are possible, the view more favourable to the accused should be taken; since the burden of proof is on the prosecution who wants to fasten the liability for murder on accused 2 and 3 vicariously. It may be noted that even the first accused used the knife (M.O. 1) only after Arunachalam had beaten him on the head with the lathi. The first accused was evidently provoked by that act of Arunachalam and it was on that provocation that he inflicted the stabs. He does not seem to have had any premeditated intention himself to stab Arunachalam. There is no evidence of any prior concert among the three accused that they should murder Arunachalam. We cannot exclude the possibility of there not having been any specific talk among themselves, and the common intention being only matter of inference from the evidence. If we are asked to infer that, the material must be strong enough. It is quite probable that the third accused, after the remark of the deceased to him as the bus stop, informed his father and brother, and that was how they came to be waiting by the side of the footpath expecting P.W. 1 and the deceased to come along that way. But, merely from that circumstance, we cannot jump to the conclusion that they had a common intention to murder Arunachalam. We must take into account the manner of the occurrence as I have done above. It may also be noted that, though according to the evidence of P.W. 1, the third accused, when he left the bus stop, uttered a threat "you come to the village. We shall commit murder", that important averment is not spoken to by P.W. 2, nor does it find place in Exhibit P-1, which is otherwise very detailed. It is, obviously an exaggeration on the part of P.W. 1, and it is not true.

38. It may be noted that even the learned Sessions Judge, who says in paragraph 27 of his judgment that the three accused had the common intention of causing the death of Arunachalam, observes in paragraph 28 as follows:

> "Regarding the sentences, it is to be stated that accused 1 to 3 do not deserve the extreme penalty provided by law for the offence of murder since accused 1 caused injury Nos. 3 and 4, detailed in

Exhibit P-2 to the deceased, and accused 2 and 3 caused injury Nos. 1 and 2 detailed in Exhibit P-2 to the deceased, *after the deceased beat on the head of accused 1 with M.O. 2* which was snatched by him from the hand of accused 1 after accused 1 beat on the head of the deceased with M.O. 2. In the circumstances I think that the ends of justice will be met if accused 1 is sentenced to imprisonment for life for the offence under 302, Indian Penal Code, and accused 2 and 3 are sentenced to imprisonment for life under section 302, read with section 34, Indian Penal Code."

39. The words underlined by me for the purpose show that even the learned Sessions Judge felt that it was not a premeditated murder and that the first accused inflicted the fatal injuries only because Arunachalam gave a blow on the head of the first accused with M.O. 2 and that was the reason why accused 2 and 3 also caused injuries to Arunachalam, and they were simple injuries. The reason which the learned Sessions Judge has given in paragraph 28 of his judgment for awarding the lesser sentence should have logically led him to conclude that there was no premeditated intention to murder Arunachalam and that no common intention to murder Arunachalam was developed at the spot, and, in my opinion the evidence does not warrant such an inference of common intention developing at the spot.

40. My main endeavour in the above discussion has been to show that no common intention to murder Arunachalam has been made out, and in the course of the discussion, I have proceeded on the view that, though the accused had gathered together and were waiting, they had no specific common intention and that each merely wanted to inflict whatever injury he could. But I am conscious that from the circumstances that the were waiting together with some weapons, it is possible to infer that they had a common intention to cause some hurt. The only question is what is the extent of that hurt? If the common intention was only to cause simple hurt, it would only be an offence under section 324, read with section 34 of the Indian Penal Code, and for practical purposes, it would not make any difference, if accused 2 and 3 were convicted under section 324 read with section 34 instead of their being convicted specifically under section 324. I have considered the question whether it is possible to infer that the common intention was to cause grievous hurt, *i.e.*, section 326 read with section 34. Here again, the difficulty which I find is that if we were to hold that there was a common intention to cause grievous hurt to Arunachalam we must logically postulate that there was a common intention to cause grievous hurt to P.W. 1 also. But actually, only simple hurt was caused to P.W. 1. Hence it is not possible to hold that in the case of Arunachalam the common intention extended to causing grievous hurt.

41. Thiru Kulandaivel, arguing for the learned Public Prosecutor, strongly relied on Exhibit P-14 as disclosing the intention of the second accused to murder Arunachalam. I think, however, that this is a far-fetched inference from Exhibit P-14. In Exhibit P-14, the wish of the second accused to cause pregnancy to P.W. 3 merely discloses very bad taste and ill-feeling against P.W. 3, but would not be sufficient to show that he intended to murder Arunachalam. If that was his intention, he could easily have caused fatal injuries himself to Arunachalam with the aruval when Arunachalam was at his mercy.

42. P.W. 3 no doubt says in chief examination that after she issued the lawyer's notice, the first accused was threatening. "Let my son (second accused) come. I shall exterminate your family, root and branch." The actual sequence of events which resulted in the death of Arunachalam does not warrant the view that even the first accused had any premeditated intention to kill Arunachalam, and certainly, the evidence is not sufficient to show that accused 2 and 3 shared any common intention with the first accused.

43. The decisions cited by Thiru Vanamamalai for his contention that section 34 of the Indian Penal Code, cannot apply are these : *Mahbub Shah* v. *King Emperor*[1] where is was observed:

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1. I.R. 72 I.A. 148 : (1945) 2 M.L.J. 144 (P.C.): A.I.R. 1945 P.C. 118.

"In their Lordships' view, the inference of common intention within the meaning of the term in section 34 should never be reached unless it is a necessary inference deducible from the circumstances of the case."

Pandurang v. *State of Hyderabad*[1]: where the above observations were quoted with approval, and it was further observed:

"But to say this is no more than to reproduce the ordinary rule about circumstantial evidence, for there is no special rule of evidence for this class of case. At bottom, it is a question of fact in every case and however similar the circumstances, facts in one case cannot be used as a precedent to determine the conclusion on the facts in another. All that is necessary is either to have direct proof of prior concert or proof of circumstances which necessarily lead to that inference, or, as we prefer to put it in the time-honoured way, the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation on any other hypothesis."

Unreported judgment of the Supreme Court in *Amrik Singh* v. *State of Punjab*[2], *Devilal* v. *State of Rajasthan*[3], *Sri Kishan* v. *State of Uttar Pradesh*[4], where the convictions under section 302 read with section 34 of the Indian Penal Code were altered to section 325, read with section 34; *Satrughan Patar* v. *Emperor*[5], *Fateh Khan* v. *Emperor*[6].

44. On behalf of the State, the following decisions were cited *Barendra Kumar* v. *King Emperor*[7], *Karnail Singh State of Punjab*[8], *Mathuralal Adhi Reddi* v. *State of Hyderabad*[9], *Wazir Singh* v. *State of Punjab*[10], *Ram Chandra* v. *State of Uttar Pradesh*[11], where the charge of murder was held not proved, but section 34 was applied for the offence of kidnapping and extortion under sections 364 and 386 of the Indian Penal Code; *Bharwad Mepa Dena* v. *State of Bombay*[1]; *Periaswami* v. *State*[2], *State of Rajasthan* v. *Kartar Singh*[3], *Hethubha* v. *State of Gujarat*[4]; *Thangaraj, In re*[5]; *Ram Tahal* v. *State of Uttar Pradesh*[6].

45. The learned Public Prosecutor, with fairness, cited also other decisions, wherein the charge of murder under section 302 read with section 34 was held not established, for example: *Chikkaranga Gowda* v. *State of Mysore*[7], *Sheoram Singh* v. *State of Uttar Pradesh*[8]. Reference was also made to *Dalip Singh* v. *State of Punjab*[9], *Afrahim Sheik* v. *State of West of Bengal.*[10] where it was held that section 34 could be applied to an offence under the second part of section 304 involving only knowledge but not intention. My learned brother also referred to a decision of this Court in *Nagappan and others* v. *The State of Tamil Nadu*[11], and the judgment of the Supreme Court on appeal therefrom in C.A. No. 78 of 1971.

46. In the result, I confirm the conviction of the first accused of the murder of Arunachalam under section 302 of the Indian Penal Code on the first charge and the sentence of imprisonment for life. I also confirm the conviction of the first accused under section 323 of the Indian Penal Code, on the third charge and the sentence of rigorous imprisonment for one year, which will run concurrently with the other sentence. I set aside the conviction of the second accused under section 302 read with section 34 of the Indian Penal Code, on the second charge, and convict him, instead, under

1. (1955) 1 S.C.R. 1083: 1955 S.C.J. 106: A.I.R. 1955 S.C. 216.
2. C.A. No. 62 of 1969 dated 17-12-1971.
3. A.I.R. 1971 S.C. 1444.
4. (1973) 1 S.C.R. 734 : A.I.R. 1972 S.C. 2056.
5. 50 I.C. 337 at 345 and 346.
6. A.I.R. 1930 Lah. 950.
7. L.R. 52 I.A. 40 : 48 M.L.J. 543 : A.I.R. 1925 P.C. 1.
8. 1954 S.C.R. 904 : 1954 S.C.J. 269 : A.I.R. 1954 S.C. 204.
9. A.I.R. 1956 S.C. 177.
10. A.I.R. 1956 S.C. 754.
11. A.I.R. 1957 S.C. 381.

1. (1960) 2 S.C.R. 172 : 1960 S.C.J. 478 : A.I.R. 1960 S.C. 289.
2. (1960) M.W.N. (Crl.) 130.
3. (1971) 1 S.C.J. 165 : (1971) M.L.J. (Crl.) 113 : A.I.R. 1970 S.C. 1305.
4. (1971) L.W. (Crl.) 245 : (1970) 2 S.C.J. 635 : A.I.R. 1970 S.C. 1266.
5. (1972) L.W. (Cr.) 170.
6. (1973) L.W. (Cr.) 110.
7. A.I.R. 1956 S.C. 731.
8. (1973) 3 S.C.C. 110: A.I.R. 1972 S.C. 2555.
9. 1954 S.C.R. 145 at 151: 1953 S.C.J. 532 : A.I.R. 1953. S.C. 364.
10. (1964) 2 Crl.L.J. 350: A.I.R. 1964 S.C. 1263.
11. R.T. No. 85 of 1969.

section 324 of the Indian Penal Code, and sentence him to undergo rigorous imprisonment for three years. I confirm his conviction under section 324 of the Indian Penal Code, on the fourth charge, and the sentence of rigorus imprisonment for two years. This sentence will run after the sentence on the second charge is over; in other words, the sentence will run consecutively. I set aside the conviction of the third accused on the second charge under section 302 read with section 34 of the Indian Penal Code and convict him instead, under section 324 of the Indian Penal Code, and sentence him to undergo rigorous imprisonment for three years.

K. N. Mudaliyar J.—The three appellants (A-1 to A-3) appeal against their convictions for offences under section 302, Indian Penal Code (A-1 only), 302 read with section 34, Indian Penal Code (A-2 and A-3 only), section 323 Indian Penal Code (A-1 only) and 324, Indian Penal Code (A-2 only) and the various sentences imposed on them.

* * * *

[The discussion of facts is omitted—]

48. In his well reasoned judgment, the learned Trial Judge has given findings which I shall describe here below. The learned Trial Judge believed the evidence of P.Ws. 1, 3 and 6 regarding the motives for the occurrence. The learned Trial Judge acted on the admission of A-1 and A-3 in regard to the receipt of Exhibit P-5 sent by and testified by P.W. 5 on behalf of P.W. 3 and her husband deceased Arunachalam Pillai. The learned Trial Judge noticed that A-2 has admitted that he sent the inland letter Exhibit P-14 dated 17th July, 1972 to A-3 and his mother, and that in Exhibit P-14, A-2 has written to the effect that he would wipe out the tears of his mother and teach a proper lesson to P.W 3 after his arrival in the village

* * * *

[The discussions of facts and circumstances omitted.]

49. The learned Trial Judge did not choose to accept the contents of Exhibit D-2 in view of his unhesitating acceptance of the testimony of P.Ws. 1 and 2. The learned Trial Judge found in effect that P.W. 1 and the deceased were not the aggressors and that A-1 had no right of self-defence when he stabbed the deceased with a knife. The learned Trial Judge further found that A-1 to A-3 were lying in wait at the place marked A in Exhibit P-25 and that all the three accused were armed with lethal weapons. After describing the various overt acts of A-1 to A-3, the learned Trial Judge found that P.W. 1 and the deceased were not the aggressors, but on the contrary A-1 to A-3, were the aggressors, and it was A-1 who attacked P.W. 1 and the deceased first with M.O. 2. In paragraph 25 of his judgment the learned Trial Judge rejected the plea of A-1 regarding the right of self-defence. The learned Trial Judge further considered the pleas of A-1 and A-3 in particular and also the plea of A-1 and concluded that the deceased did not attack A-1 suddenly with an aruval. On the contrary he found that A-1 to A-3 attacked the deceased and caused all the four injuries as described in Exhibit P-2.

50. The learned counsel for the appellants argued that there was no meeting or confrontation between P.W. 1 and his son-in-law Arunachalam Pillai (deceased) and A-3 and that the wordy altercation between them is a mere introduction of a false thing by P.W. 1 and that there was no need for them to stay on talking at the junction bus stop for about 45 minutes. Remembering the anterior history of enmity between P.Ws. 1 and 3 and P.W. 3's husband and the members of the family of A-1, A-2 and A-3 and the two incidents in which A-2 abused P.W. 3 with the result that she left for her father's home and the later incident in which A-1 to A-3 went to the house of P.W. 1 aggressively and started a quarrel at about 10-30 P.M. on the night of 28th July, 1972, there is little wonder that A-3 should have been out for watching the movements of P.W. 1 and his son-in-law, Arunachalam Pillai who were returning from Tuticorin. Probably A-3 wanted to make sure of their victim, for A-1 to A-3 must have arrived already and lying in wait at point 'A' in Exhibit P-25 for their quarry. There is nothing extraordinary for the rural people like

P.Ws. 1, 2 and Perumal Pillai (not examined) and Arunachalam Pillai (deceased) to have hibernated at the bus stop for some time before they started walking to Pettaloorani, particularly in the wake of the unseemly reply probably given in a bellicose mood by A-3 on his being questioned by Arunachalam Pillai (deceased). The learned counsel further argued that all the three accused would not be armed with the weapons which are now ascribed to them if they were lying in wait for their victim. I am unable to see any force in this argument. The weapons with which all the three accused were armed are dangerous weapons which could be used with lethal and mortal effect on the victims. If only P.W. 2 did not run for safety even leaving behind his dhothi M.O. 3, he would have also been cut to death. Fortunately, he escaped when his son-in-law fell a victim to the murderous attack of the three accused.

* * * * *

[The discussion of facts and circumstances omitted.]

51. The only serious argument, in my view submitted by the learned counsel is that there was no common intention to murder the deceased Arunachalam Pillai on the part of A-2 and A- 3, because Arunachalam Pillai (deceased) was not necessarily the target of the attack by A-1 to A-3. After all, Arunachalam Pillai was living in Tuticorin. Therefore, there was a preconcert on the part of A-1 to A-3 in respect of the attack of P.W. 1 only, and not against Arunachalam Pillai (deceased). The sequence of the murderous assault would not support the preconcert against Arunachalam Pillai (deceased). Therefore, common intention cannot be attributed to A-2 and A-3. In Exhibit P-1, only threat by A-3 is averred and it may be that the common intention on the part of A-2 and A-3 is the cause of grievous injury. I am afraid, this argument proceeds on the basic misapprehension of the evidence that P.W. 1 was responsible for the issue of Exhibit P-5. A perusal of the testimoney of P.W. 5 would show that on 15th April, 1972 on instructions from P.W. 3 and her husband P.W. 5 (an Advocate) issued the notice to A-1, his wife Pechi Ammal, her son A-3, and his daughter Annalakshmi Ammal. P.W. 5 was not cross-examined at all. Therefore, the assumption that P.W. 1 was responsible for the issue of Exhibit P-5 falls to the ground. It referred to the notice Ex. P-5 and the consequential animosity arising from the claim for damages is only between the family members of the accused and Arunachalam Pillai (deceased) and his wife P.W. 1. To my mind, A-1 and A-2 and A-3 were for the blood of Arunachalam Pillai (deceased) or even may be for the blood of his wife P.W. 3. They even went and created gallata in the house of P.W. 1 wherein P.W. 3 sought shelter on the night of 28th July, 1972 after she was humiliated by the filthy abuse from A-2. That only shews that they were always tracking her foot-steps or her husband's. Getting a scent of the move by P.W. 1 to get his son-in-law to the village of Pottaloorani from Tuticorin A-3 was making sure of their intended victim and he must have given the material information of the arrival of Arunachalam Pillai (deceased) to A-1 and A-2 at point 'A' in Exhibit P-25. I have no doubt in my mind that undoubtedly the target was only the murdered victim Arunachalam Pillai (deceased). The second accused admitted in his statutory explanation (when questioned under section 342, Criminal Procedure Code) that the contents of Exhibit P-14 are in his handwriting—not merely that he admitted having signed the letter, Exhibit P-14. It is extracted here below for the purpose of gathering his murderous intention against P.W. 3 and her husband even as early as 17th February, 1972, barely within 12 days:—his simmering indignation would not die down immediately on his arrival in the village.

* * * * *

[Discussion of facts omitted.]

52. The author of Exhibit P-14 (A-2) must have been capable of uttering the most slanderous and unutterable language particularly when he saw P.W. 3 in the village next to his house. A-3 being a young and inflammable youth of 29 years must have seen his revengeful father armed with two weapons and certainly when he was armed with a pen knife

his intention was to murder Arunachalam Pillai (deceased). P.W. 1 cannot be the target at all, for, he did nothing that would rouse the enmity or animosity of A-1 to A-3 against P.W. 1. The entire recorded evidence would show that P.W. 1 gave shelter to his daughter P.W. 3 only during the night of 28th July, 1972. The entire quarrel resulting from the sullage water flowing in front of the house of P.W. 3 and the consequential assault on P.W. 3 and resultant complaint ending in the sentence of fine: vide Exhibit P-17, and the further claim for damages by P.W. 3 and her husband through Exhibit P-5 as testified by P.W. 5 would only show that Arunachalam Pillai (deceased) alone was the principal target for their attack. I am unable to see any other way of concluding from the sequence of attack that Arunachalam Pillai and Arunachalam Pillai alone was the only target for the murderous assault committed by A-1 to A-3. There has been a catena of cases cited by the learned Public Prosecutor and the learned counsel for the appellants, and it is unnecessary for me to extract the relevant portions from the various decisions cited from the bar.

53. The following decisions have been cited by the learned counsel for the appellants and the learned Public Prosecutor: *Satrughan Patar* v. *Emperor*[1]; *Barendra Kumar* v. *King Emperor*[2], *Fatehkhan* v. *Emperor*[3]; *Mahbub Shah* v. *Emperor*[4]; In re *Nachimuthu Goundan*[5], *Kripal* v. *State of U.P.*[6]; *Pandurang* v. *State of Hyderabad*[7]; *M. A. Reddy* v. *State of Hyderabad*[8], *Chikkarang Gowda* v. *Mysore State*[9]; *Wazir Singh* v. *State of Punjab*[10]; *Ramchandra* v. *U. P. State*[11]; *Bhawad Mepa Dana* v. *State of Bombay*[12]; *Periaswami* v. *State*[13]; *Dalip Singh and others* v. *State of Punjab*[1]; *Karnail Singh and another* v. *State of Punjab*[2]; *Afrahim Sheikh* v. *State of West Bengal*[3]; *Amriksingh and others* v. *State of Punjab*[4]; *Hathubha* v. *State of Gujarat*[5]; *Gaya Prasad* v. *State of Maharashtra*[6]; *Devilal* v. *State of Rajasthan*[7]; *Ram Lal* v. *Delhi Administration*[8] *Karivadai* alias *Periaswamy*, In re[9]; *State* v. *Karuppanna Thevar*[10]; *Ram Tahal* v. *State of U.P.*[11]; *Shri Kishan* v. *State of U.P.*[12]; *Sheoram Singh* v. *State of U.P.*;[13] *Thangaraj*, In re[14].

54. I would like to bear in mind the principles enunciated in some of the leading decisions cited before the Court. I now make the relevant gleanings from some of the said leading decisions. Their Lordships of the Privy Council in *Barendra Kumar* v. *King Emperor*[15], observed as follows:

> " The appellant's argument is, in brief, that in section 34, 'a criminal act' in so far as murder is concerned, means an act which takes life criminally within section 302 because the section concludes by saying "is liable for that act in the same manner as if the act were done by himself alone" and there is no act done by himself alone, which could make a man liable to be punished as a murderer, except an act done by himself and fatal to his victim. Thus the effect is that, where each of several persons does something criminal all acting in furtherance of a common intention, each is punishable for what he has done, as if he had done it by himself. Such a proposition was not worth enacting, for, if a man has done

1. (1919) 50 I.C. 377.
2. L.R. 52 I.A. 40 : 48 M.L.J. 543 : A.I.R. 1925 P.C. 1.
3. A.I.R. 1950 Lah. 950.
4. (1945) M.W.N. (Cr.) 69 : (1945) 2 M.L.J. 144: A.I.R. 1945 P.C. 118.
5. I.L.R. (1947) Mad. 425: (1946) 2 M.L.J. 137: A.I.R. 1947 Mad. 259.
6. A.I.R. 1954 S.C. 706.
7. 1955 S.C.J. 106: A.I.R. 1955 S.C. 216.
8. A.I.R. 1956 S.C. 117.
9. 1956 Crl.L.J. 1365: A.I.R. 1956 S.C. 731.
10. A.I.R. 1956 S.C. 754.
11. 1957 Crl.L.J. 559: A.I.R. 1957 S.C. 381.
12. 1960 S.C.J. 478: A.I.R. 1960 S.C. 289.
13. 1960 M.W.N. (Cr.) 130.

1. 1953 S.C.J. 532: A.I.R. 1953 S.C. 364.
2. 1954 S.C.J. 269: A.I.R. 1954 S.C. 204.
3. (1964) 6 S.C.R. 172: A.I.R. 1964 S.C. 1263.
4. C.A. No. 62 of 1969 (S.C.).
5. (1970) 2 S.C.J. 635: A.I.R. 1970 S.C. 1266.
6. A.I.R. 1971 S.C. 1112.
7. (1971) Crl.L.J. 1132: A.I.R. 1971 S.C. 1444.
8. (1973) 1 S.C.W.R. 179: A.I.R. 1972 S.C. 2462.
9. (1972) L.W. (Crl.) S.N. 14.
10. (1972) 1 M.L.J. 26.
11. (1972) 2 S.C.J. 303: A.I.R. 1972 S.C. 254.
12. (1973) 1 S.C.R. 734: A.I.R. 1972 S.C. 2056.
13. (1973) 1 S.C.R. 939: A.I.R. 1972 S.C. 2555.
14. (1972) L.W. (Crl.) 170.
15. 52 L.R. 40 :48 M.L.J. 543: A.I.R. 1925 P.C. 1.

something criminal in itself, he must be punishable for it, and none the less so, that others were doing other criminal acts of their own at the same time and in furtherance of an intention common to all. It follows from the appellant's argument that the section only applies to cases where several persons acting in furtherance of a common intention do some fatal act, which one could do by himself. Criminal action, which takes the form of acts by several persons, in their united effect producing one result, must then be caught under some other section and except in the case of unlawful assembly, is caught under attempts or abetment. By way of illustration it may be noted that, in effect, this means, that, if three assailants simultaneously fire at their victim and lodge three bullets in his brain, all may be murderers, but, if one bullet only grazes his ear, one of them is not a murderer and 'each being entitled to the benefit of the doubt, all must be acquitted of murder, unless the evidence inclines in favour of the marksmanship of two or of one. This argument evidently fixes attention exclusively upon the accused person's own act. Intention to kill and resulting death accordingly are not enough; there must be proved an act, which kills, done by several persons and corresponding to if not identical with, the same fatal act done by one. The answer is that, if this construction is adopted, it defeats itself, for several persons cannot do the same act as one of them does. They may do acts identically similar, but, the act of each is his own, and because it is his own and is relative to himself, it is not the act of another, or the same as that other's act. The result is that section 34 construed thus, has no content and is useless. Before the High Court the appellant's counsel put an illustration of their own which may be taken now, because the whole range of feasible illustrations being extraordinarily small this one is equally exact in theory and paradoxical in practice. Suppose two men tie a rope round the neck of a third and pull opposite ends of the rope till he is strangled. This they said really is an instance of a case under section 34. Really it is not. Obviously each is pulling his own end of the rope, with his own strength, standing in the position that he chooses to take up and exerting himself in the way that is natural to him, in a word in a way that is his. Let it be that in effect each pulls as hard as the other and at the same time and that both equally contribute to the result. Still the act, for which either would be liable, is done by himself alone, is precisely not the act done by the other person. There are two acts, for which both actors ought to suffer death separately done by two persons but identically similar. Let us add the element that neither act without the other would have been fatal, so that the fatal effect was the cumulative result of the acts of both. Even this does not make either person do what the other person does, it merely makes the act, for which he would be liable if, done by himself alone, an attempt to murder and not an act of murder, and accordingly the case is not an illustration of section 34. To this the reply was made before the High Court, that, in a case where death results from the cumulative effect of different acts, each actor must be deemed guilty of murder, though whether because it cannot be shown that it was not his act alone which took the victim's life, or because the absurdity of the argument had to be disclaimed somehow, it is not easy to determine. Yet, absurd it is and absurd it must remain. "Where two men have done a man to death", said the learned counsel (Record 127), your Lordships will not inquire into the individual effect of each blow, but the point I am insisting on is that the doing to death must have been the joint acts of both. This concession, rational enough in itself, is another way of saying that the section really means 'when a joint criminal act has been done by the acts of two persons in furtherance of a common intention each is liable for that joint criminal act, as if he had done it all by himself.' On the other hand, if it is read as the appellant reads it, then, returning to the illustration of the rope, if both men are charged together but each is to be made lia-

ble for his act only and as if he had done it by himself, each can say that the prosecution has not discharged the onus, for no more is proved against him than an attempt, which might not have succeeded in the absence of the other party charged. Thus, both will be acquitted of murder, and will only be convicted of an attempt, although the victim is and remains a murdered man. If, on the other hand, each were tried separately by different juries, either jury or both, taking the view that the violence used by the man before them killed the man, whom they knew to be dead, might return unimpeachable verdicts of murder, and then, both men would be justly hanged.

As soon, however, as the other sections of this part of the Code are looked at, it becomes plain that the words of section 34 are not to be eviscerated by reading them in this exceedingly limited sense. By section 33, a criminal act in section 34, includes a series of acts, and further, "act" includes omission to act, for example, an omission to interfere in order to prevent a murder being done before one's very eyes. By section 37, when any offence is committed by means of several acts whoever intentionally co-operates in the commission of that offence by doing any one of those acts, either singly or jointly with any other person, commits that offence. Even if the appellant did nothing as he stood outside the door, it is to be remembered that in crimes as in other things "they also serve who only stand and wait". By section 38 when several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act. Read together these sections are reasonably plain. Section 34 deals with the doing of separate acts, similar or diverse, by several persons; if all are done in furtherance of a common intention each person is liable for the result of them all, as if he had done them himself, for "that act" and "the act" in the latter part of the section must include the whole action covered by as "a criminal act" in the first part because they refer to it. Section 37 provides that, when several acts are done so as to result together in the commission of an offence, the doing of any one of them, with an intention to co-operate in the offence (which may not be the same as an intention common to all) makes the actor liable to be punished for the commission of the offence. Section 38, provides for different punishments for different offences as an alterative to one punishment for one offence whether the persons engaged or concerned in the commission of a criminal act are set in motion by the one intention or by the other.

The other part of the appellant's argument rests on sections 114 and 149 and it is said that, if section 34 bears the meaning adopted by the High Court, these sections are otiose. Section 149, however, is certainly not otiose, for in any case it creates a specific offence and deals with the punishment of that offence alone. It postulates an assembly of five or more persons having a common object, *viz.*, one of those named in section 141 (*R.* v. *Sabed Ali*)[1], and then, the doing of acts by members of it in prosecution of that object. There is a difference between object and intention, for though their object is common, the intentions of the several members may differ and indeed may be similar only in respect that they are all unlawful while the element of participation in action which is the leading feature of section 34 is replaced in section 149 by membership of the assembly at the time of the committing of the offence. Both sections deal with combinations of persons who become punishable as sharers in an offence. Thus they have a certain resemblance and may to some extent overlap, but section 149 cannot at any rate relegate section 34 to the position of dealing only with joint action by the commission of identically similar criminal acts, a kind of case which is not in itself deserving of separate treatment at all".

55. Their Lordships of the Privy Council held in *Mahabub Sha* v. *The King Emperor*[2]

1. 11 Beng. L.R. 359.
2. (1945) M.W.N. (Crl.) 69: L.R. 72 I.A. 148: (1945) 2 M.L.J. 144: A.I.R. 1945 P.C. 118.

that section 34, Indian Penal Code lays down a principle of joint liability in the doing of a criminal act. The section does not say "the common intention of all" nor does it say 'an intention common to all.'

"Under the section, the essence of that liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. To invoke the aid of section 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in the furtherance of the common intention of all; if this is shown then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. This being the principle, the common intention within the meaning of the section implies a prearranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the prearranged plan. It is difficult, if not impossible to procure direct evidence to prove the intention of an individual, in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case. Care must be taken not to confuse same or similar intention with common intention; the partition which divides their contents is often very thin, nevertheless, the distinction is real and substantial; and if overlooked will result in miscarriage of justice. The inference of common intention within the meaning of the term in section 34 should never be reached unless it is a necessary inference deducible from the circumstances of the case.

While interpreting the scope of section 34 of the Indian Penal Code as expounded in the dicision in *Mahbub Shah* v. *Emperor*[1], two learned Judges of this Court held. In re *Nachimuthu Goundan and others*[2], that the decision of the Privy Council in *Mahbub Shah* v. *Empeor*[1], is warrant only for the prosecution that it is not enough to attract the provisions of section 34 of the Indian Penal Code that there was the same intention on the part of several people to commit a particular criminal act or a similar intention but that it is necessary before the section could come into play that there must be pre-arranged plan in pursuance of which the criminal act was done.

Their Lordships do not rule out the possibility of a common intention developing in the course of events though it might not have been present to start with, nor do they say that the intention cannot be inferred from the conduct of assailants. The question whether there was such an intention or not will have to depend in many cases on inferences to be drawn from the proved facts and not on any direct evidence about a pre-conceived scheme or plan which may not be available at all."

Their Lordships of the Supreme Court in *Hethubha* v. *State of Gujarat*[1], observed as follows:—

"This Court in the case *Shankarlal Kacharabhai and others* v. *State of Gujarat*[2], said that a mistake by one of the accused as to killing *X* in place of *Y* would not displace the common intention if the evidence showed the concerted action in furtherance of prearranged plan. The dominant feature of section 34 is the element of participation in action. The participation need not in all cases be by physical presence. Common intention implies acting in concert. There is a pre-arranged plan which is proved either from conduct or from circumstances or from incriminating facts. The principle of joint liability in the doing of a criminal act is embodied in section 34 of the Indian Penal Code. The existence of common intention is to be basic for liability. That is why the prior concert and the prearranged plan is the foun-

1. (1945) M.W.N. (Crl.) 69: L.R. 72 I.A. 148: (1945) 2 M.L.J. 144: A.I.R. 1945 P.C. 118.
2. I.L.R. (1947) Mad. 425: (1946) 2 M.L.J. 137: A.I.R. 1947 Mad. 259.

3. (1971) L.W. (Crl.) 245: (1971) 1 S.C.R. 31: 1970 S.C.J. 635: (1970) M.L.J. (Crl.) 814: A.I.R. 1970 S.C. 1266.
2. (1965) 1 S.C.R. 287: A.I.R. 1965 S.C. 1260.

dation of a common intention to establish liability and guilt.

Applying these principles to the evidence in the present case it appears that there was pre-arranged plan of the accused to commit offences. All the accused were lying in wait to attack the party of Amarji, Vaghji, Pabhaji and Panchanji. Amarji was in the forefront. The accused attacked him. Vaghji was also attacked and prevented from going to the relief of Amarji. The plea that Amarji was mistaken for Vaghji would not take away the common intention established by pre-arranged plan and participation of all the accused in furtherance of common intention of them all without each of them having intended to do the particular act is exactly the same way as an act might be done by one member of an unlawful assembly in prosecution of the common intention which the other members of the unlawful assembly did not each intend to be done".

56. Venkataraman and Ganesan, JJ. in *Thangaraj, In re*[1], held that the notion that the injuries should normally be on what the layman considers to be the vital parts of the body in order to constitute murder in law is not correct. Under Clause 3 of section 300, Indian Penal Code, in particular, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. When section 34, Indian Penal Code, speaks of a criminal act, it embraces all the series of acts by which the injuries were inflicted. This is clear enough from a reading of sections 33 and 34, Indian Penal Code but, it has also been made clear by their Lordships of the Privy Council in *Barendra Kumar Gosh* v. *The King Emperor*[2], and that has been referred to by Their Lordships of the Supreme Court in *Afrahim Sheikh* v. *State of West Bengal*[3], Thus it is clear that in order to invoke section 34, Indian Penal Code, what must be determined is whether all the injuries taken cumulatively were inflicted in furtherance of a common intention of all. It was further held that on the facts, each of the four accused was liable for all the injuries cumulatively in the same manner as if all of them were caused by him alone. In other words, each of them would be guilty under section 302 read with section 34, Indian Penal Code. The First Earl of Birkenhead, Lord Chancellor of England 1919—1922 in This "Famous Trials" (published by Hutchinson and Company Ltd., London) at page 349 states the relevant principle of law with unsurpassed brilliance in the following language:

"It is necessary therefore to digress somewhat to explain the rules which govern joint responsibility for a criminal act committed by one person. It is not necessary either in law or in reason that the actual deed shall have been done by an accused person. When he acts alone, that act may be done by him or by an innocent agent. If several unite in a criminal design, the act of one in furtherance of that design is imputable to all. If *A*. *B*. and *C* acting in concert, meet *D*, and *A* jostles him and *B*, thereby enabled to pick his pocket takes his purse and hands it to *C*, then the theft is committed by *B* alone in the sense that it is he who does the felonious taking. But it is obvious that all three are, and ought to be, equally guilty of the theft. Again if two men set out to commit a burglary, one to stand outside and watch and the other to break in and steal, both are equally guilty of burglary. But, if the marauder kills any house-holder who suddenly disturbs him, then the watcher is not guilty of murder, unless it can be shown that there was a common plan to overcome opposition by force. In other words, a man cannot be held guilty of an act which he did not plan and had no intention to bring about.

Mrs. Thompson therefore was not guilty unless Bywaters was acting in concert with her. Mr. Justice Shearman said to the jury "You will not convict her

1. (1972) L.W. (Crl.) 170.
2. L.R. 52 I.A. 40: I.L.R. 52 Cal. 197: 48 M.L.J. 542: A.I.R. 1925 P.C. 1.
3. A.I.R. 1964 S.C. 1263.

unless you are satisfied that she and he agreed that this man should be murdered when he could be, and she knew that he was going to do it, and directed him to do it, and by arrangement between them he was doing it".

57. Applying these principles to the facts of the present case, I now hold that the following facts: that A-1 to A-3 are the members of the same family, that A-1 is the father of A-2 and A-3, that all the three accused were inimical towards the deceased Arunachalam Pillai and his wife, P.W. 3, that there was a quarrel ending in P.W.3 being beaten by A-1, A-3 and the wife and daughter of A-1, that A-1, A-3 and the wife and daughter of A-1 were sentenced to pay fine, that P.W. 3 and her husband caused the issue of Exhibit P-5 notice as testified by P.W. 5 to A-1, A-3 and the wife and the daughter A-1, that enraged by the representations received from his home A-2 should have ventilated his outbursts of fury and indignation against P.W. 3 and her husband in Exhibit P-14 dated 7th July, 1972, that A-2 abused P.W. 3 during the day of 28th July, 1972 in such a filthy language that she got frightened and went away to her father's home for safety on the night of 28th July, 1972, that A-3 should have seen and encountered Arunachalam and his father-in-law P.W. 1 at the junction bus-stop at about 2-30 P.M. on 29th July, 1972, that A-1 to A-3 were lying in wait at point 'A' in Exhibit P-25 that in the course of the attack on Arunachalam Pillai (deceased) A-1 caused the two fatal injuries, that even after he fell down at point 'B' in Exhibit P-25, A-3 should have gone and stabbed the felled, prostrate, injured and dying Arunachalam Pillai (deceased), that A-2 armed with aruval should have cut the victim with the background of vindictive revenge against Arunachalam Pillai (deceased) and his wife, that all the three accused should have left the scene towards northwards at one and the same time, would impel me to hold that A-2 and A-3 were actuated by the common intention to murder Arunachalam Pillai (deceased) within the meaning of section 34, Indian Penal Code read with section 302, Indian Penal Code. The learned Trial Judge observed as follows:

"Inasmuchas A-2 caused injury No. 1 on the head of the deceased by cutting with an aruval and as A-3 caused injury No. 2 on the back of the deceased by stabbing with a pen-knife at the time of occurrence, as spoken to by P.Ws. 1 and 2, it can be said that A-2 and A-3 had common intention along with A-1 to cause the death to the deceased and A-1 to A-3 had prior concert to do away with the deceased. If A-1 to A-3 had no prior concert, A-2 would not have caused injury No. 1 with aruval and A-3 would not have caused injury No. 2 with a pen-knife in addition to fatal injuries caused by A-1."

The reasoning of the learned Trial Judge is irreproachable and I affirm his finding in toto in regard to the common intention that actuated A-2 and A-3 to murder Arunachalam Pillai. A-1 pleaded that he was cutting thorns for the purpose of putting up fence in his garden and that Arunachalam Pillai (deceased) suddenly gave a cut forcibly on his head with an aruval. If he was really cutting thorns there must have been found at the scene of crime some thorns cut and gathered by him. It was not even suggested to P.W. 13 (who prepared the observation mahazar Exhibit P-10) that there were thorns cut by A-1 either bundled or not bundled in or near about the scene of crime. It is impossible for me to imagine that just before he started cutting a single thorn, just at that crucial point of time Arunachalam Pillai (deceased) was so aggressive as to cut A-1. The plea of A-1 does not account for the injuries of P.W. 1 who is eye-witness to the occurrence, corroborated by P.W. 2. Apart from the injuries sustained by P.W. 1, there is the recovery of M.O. 3, the dhoti caught in the thorny bush when he ran for his life, after receiving the injuries from A-1 and A-2. I repel the circumstances pleaded by A-1 for invoking his right under section 100, Indian Penal Code. I accept the evidence of P.Ws. 1 and 2 in regard to the overt acts attributed against A-1 inflicting injury numbers 3 and 4 on Arunachalam Pillai (deceased) which are proved to be fatal individually.

58. I confirm the conviction of A-1 for an offence punishable under section 302,

Indian Penal Code. Regarding the question of sentence, there are very strong grounds for awarding death sentence against A-1. All the circumstances culminating in the murder of Arunachalam Pillai (deceased) furnish strong reasons for awarding death sentence against A-1. But unfortunately the State or learned Public Prosecutor has not filed a revision petition for the enhancement of sentence against A-1. Had the State filed the criminal revision petition for the enhancement of sentence, I would have had no hesitation in enhancing the sentence of imprisonment for life to one of death. In these circumstances I cannot but help confirming the sentence of imprisonment for life.

59. I have already found that A-2 and A-3 were actuated by common intention along with their own father A-1 to commit the murder of Arunachalam Pillai (deceased). Therefore, while I have no hesitation in affirming the reasoning and finding of the learned Trial Judge in regard to the guilt of A-2 and A-3 for the offence punishable under section 302, Indian Penal Code, read with section 34, Indian Penal Code, I confirm their conviction for offence punishable under section 302 read with section 34, Indian Penal Code, and the sentence of imprisonment for life awarded against him.

60. I also confirm the conviction of A-1 for an offence under section 323, Indian Penal Code, under charge No. III and also the sentence of one year rigorous imprisonment. I also confirm the conviction of A-2 for an offence under section 324, Indian Penal Code, under charge No. IV and the sentence of two years rigorous imprisonment. I also direct that the sentence of imprisonment imposed on A-1 and A-2 under charges 3 and 4 to run concurrently with the sentence imposed on A-1 under charge No. 1 and A-2 under charge No. 2.

61. The Criminal Appeal is dismissed.

Venkataraman, J.—In view of the difference of opinion between us, this case will be laid before another Judge under section 392 of the Criminal Procedure Code.

K. N. Mudaliyar, J.—While agreeing with my learned brother, I would suggest the setting up of a convention in view of the proviso to section 392, Criminal Procedure Code, that in an appeal when two Judges are divided in their opinion the relevant appeal may be re-heard and decided by a larger Bench of Judges. I would commend the example of the British Courts where three Judges sit in the Court of Appeal (Criminal Division) hearing any appeal from the Judgment of a Single Judge of the High Court.

This appeal in pursuance of the Order of reference came on for hearing before the Full Bench.

N.T. Vanamamalai, for Appellants.

The Public Prosecutor on behalf of the State.

Both sides expressed a doubt as to the legality of the posting of the appeal before the Full Bench.

The Order of the Court was pronounced by

Kailasam, J.—On a difference of opinion between two learned Judges of this Court, the appeal has been placed before a Full Bench on the orders of the learned Chief Justice.

65. At the outset, the learned Counsel for the appellants as well as the Public Prosecutor expressed a doubt as to the legality of the posting of the appeal before the Full Bench. Mr. Vanamamalai, the learned counsel for the appellants pointed out that under the amended section 392 of the Criminal Procedure Code, proviso to the section enables one of the Judges constituting the Bench to require the appeal to be re-heard and decided by a larger Bench of Judges. This proviso is applicable to cases that are heard under the new Code. The present appeal was pending at the time when the new Code came into force, and, therefore, according to section 484 of the Criminal Procedure Code, 1973, the appeal shall be disposed of in accordance with the provisions of the Criminal Procedure Code, 1898, which was in force immediately before the commencement of the new Code. This would imply that section 429 of the Criminal Procedure Code, 1898, is applicable. In section

429 of the Criminal Procedure Code, 1898; there is no proviso, which would enable one of the Judges to require the re-hearing of the appeal before a larger Bench of Judges. Further, the learned counsel also referred us to the wording of the opinion of the Judge, who desired the posting of the matter before a Full Bench that he agreed with the referring order of Venkataraman, J., wherein he has directed the matter to be placed before the third Judge under section 392 of the Criminal Procedure Code. This, according to the learned counsel for the appellants, does not clearly indicate the desire of K. N. Mudaliyar, J., to have the matter placed before a Full Bench. It is unnecessary for us to go into the question raised, for the learned Chief Justice, after consideration of the entire matter has directed the appeal to be heard by a Full Bench. The validity of the order of the learned Chief Justice cannot be questioned, for, under Rule 6 of the Appellate Side Rules, High Court, Madras, notwithstanding anything contained in the Rules, the Chief Justice may direct that any application, petition, suit, appeal, or reference shall be heard by a Full Bench as defined in these rules. The order of the learned Chief Justice puts an end to the doubts that are expressed at the bar. There could be no valid objection to the Full Bench dealing with the appeal.

(Then the Full Bench heard the appeal on merits).

The Judgment of the Full Bench was pronounced by

Kailasam, J.—Three accused, the father and his two sons were tried by the learned Sessions Judge of Tirunelveli for the offence of causing the death of one Arunachalam Pillai on the 29th of July, 1972 at about 3 P.M. at Pattaloorani village and found guilty of the offences under sections 302 and 323, Indian Penal Code (against A-1), sections 302 read with section 34, and section 324, Indian Penal Code (against A-2) and section 302 read with section 34, Indian Penal Code (against A-3) and sentenced to imprisonment for life. There were four charges framed against the accused. The first charge against the first accused was for an offence under section 302, the second against A-2 and A-3 for an offence under section 302 read with section 34, the third was against A-1 for an offence under section 323, and the fourth was against A-2 for an offence under section 324, Indian Penal Code, for causing simple hurt with dangerous weapon.

67. The case of the prosecution briefly is, that there was enmity between P.Ws. 1 to 3 and the deceased on the one side, and Accused 1 to 3 on the other, due to some trouble over the draining of sullage water.

* * * * *

[His Lordship discussed the evidence and held.]

68. On a careful consideration of the entire evidence, we are not satisfied that A-2 and A-3 shared a common intention to cause the death of the deceased. On the other hand, we agree that they took part in the attack and caused simple injuries with dangerous weapons to the deceased, as well as P.W. 1, and they would be guilty of an offence under section 324, Indian Penal Code for the injuries they caused to the deceased. A-1 will be guilty of an offence under section 324, Indian Penal Code, for causing hurt to P.W. 1, and the sentence of 2 years rigorous imprisonment is confirmed. Regarding the injuries caused to the deceased, A-2 and A-3 will be sentenced under section 324, Indian Penal Code to rigorous imprisonment for three years. So far as injury caused to P.W. 1 is concerned, the conviction of A-1 and A-2 under sections 323 and 324 is confirmed.

69. In the result, we confirm the conviction under section 302, Indian Penal Code, and the sentence of imprisonment for life imposed on A-1's conviction under section 323, Indian Penal Code, and the sentence of rigorous imprisonment for one year is also confirmed, but the sentences to run concurrently. Regarding A-2 and A-3 they are acquitted of the offence under section 302, Indian Penal Code, read with section 34, Indian Penal Code but instead, found guilty under section 324, Indian Penal Code, and they are sentenced to rigorous imprisonment

for a period of three years. The sentences imposed on A-2 will run concurrently.

70. With these modifications the Criminal Appeal is dismissed.

R.S. ——— *Appeal dismissed; conviction & sentences modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*Ramanujam and V. Ramaswami, JJ.*

M/s. Bhagwan Motor Company, 79, Sembudoss Street, Madras-1.
.. *Petitioner**

v.

The Government of Madras represented by the Deputy Commissiner of Commercial Taxes, Madras
.. *Respondent.*

Madras General Sales Tax Act (I of 1959), *section* 16—*Revised assessment—Purchase of tramlines—Offer by one party—Purchase by the nominee of the party—Whether there is sale by the party to the nominee—Who is actual purchaser.*

Messrs. Kuppuswami Naicker and Sons were partners of Messrs. Bhagwan Motor Company. Messrs. Kuppuswami Naicker and Sons offered to purchase the assets of a certain company. This was accepted. Messrs. Kuppuswami Naicker and Sons then informed the seller that Messrs. Bhagwan Motor Company will perform the terms of the sale agreement as their nominees. A question arose as to whether Messrs. Bhagwan Motor Company were the purchasers of the assets from Messrs. Kuppuswami Naicker and Sons.

Held: on the facts: The purchase of assets by Messrs. Kuppuswami Naicker and Sons was really for Messrs. Bhagwan and Company. Messrs. Kuppuswami Naicker and Sons did not become purchasers in their own right and Messrs. Bhagwan Motor Company who were their nominees, were the actual purchasers. [*Para.* 8.]

Cases referred to:—

Bayyana Bhimayya v. *Government of Andhra Pradesh*, (1961) 12 S.T.C. 147 : (1961) 1 An.W.R. (S.C.) 196 : (1961) 1 M.L.J. (S.C.) 196 : (1961) 1 S.C.J. 636 : (1961) 3 S.C.R. 267: A.I.R. 1961 S C. 1065; *State of Andhra Pradesh* v. *Kolla Sree Ramamurthy*, (1962) 13 S.T.C. 522 : (1963) 1 S.C.R. 184 : A.I.R. 1962 S.C. 1585.

Petition under section 38 of the Act of 1958 praying the High Court to revise the order of the Court of the Sales Tax Appellate Tribunal dated 1st March, 1968 and passed in Tribunal Appeal No. 452 of 1956.

M.R.M. Abdul Karim, for Petitioner.

K. Venkataswamy 1st Assistant Government Pleader, for Respondent.

The Judgment of the Court was delivered by

Ramanujam, J:—The petitioners herein are dealers in hardware and pipes. They had dismantled the tramlines within the City of Madras, stocked them and sold the rails. For the assessment year 1961-62 they were originally assessed on 25th June, 1962 on a turnover of Rs.1,09,980.27. Later, the petitioners' place of business had been inspected by the authorities on 30th January, 1965 and certain account books and documents had been recovered. On a comparison of those seized records with the regular accounts of the petitioners it was found that the dealings referred to in the seized records had not been accounted for in their regular accounts. In particular, it was found from those seized records that the petitioners had effected sales of tram rails to a dealer in Calcutta to the extent of Rs. 2,13,386.33 from August, 1961 to March, 1962 but that the said turnover had not been shown either in their accounts or in their monthly returns. It was also found that the petitioners had sold tram rails to two other parties for about Rs.40,000 during the year 1961-1962. The assessing authority therefore revised the original assessment by including a turnover of Rs.2,53,378.07 in the turnover already determined as sales suppressions. It also imposed a penalty of Rs.7,600 under section 16 (2) of the Madras General Sales Tax Act, 1959,

* T.C. No. 382 of 1969 and Revn. No. 257 of 1969. 31*st July*, 1973.

for failure to disclose the suppressed turnover in their monthly returns.

2. The petitioners' appeals against the said addition before the Appellate Assistant Commissioner and the Sales Tax Appellate Tribunal were unsuccessful. Though various contentions were raised before the authorities below, before us the learned counsel for the petitioners confined his attack on the revised assessment only on one point. His contention was that the sales of rails effected by the petitioners to the various parties during the assessment year are only second sales and hence they are not taxable under the Act. According to the learned counsel the petitioners purchased the rails in question from Messrs. S.P. Kuppuswami Naicker and Sons who should be taken to be the first sellers of the rails within the State and as such they are liable to be taxed on their sales to the petitioners. It is urged by Mr. M.R.M. Abdul Karim learned counsel for the petitioners that Messrs. Kuppuswami Naicker and Sons purchased the tram rails from the Madras Electric Tramways Ltd., and subsequently sold the same to the petitioners, and that if really the petitioners are not the first sellers of the tram rails (iron scrap), they cannot be made liable to tax as iron scrap is liable to a single point levy on the first sale within the State. Therefore, the only question to be decided in this case is whether the petitioners are the first sellers as urged by the Revenue or whether the said Messrs. Kuppuswami Naicker and Sons are the first sellers as urged by the petitioners.

3. The petitioners' learned counsel referred to the proceedings in O.P.No 419 of 1953 on the file of the High Court and the various orders passed by this Court regarding the sale of the tram rails and submitted that the sale of tram rails ordered by the High Court was only in favour of the said Messrs. Kuppuswami Naicker and Sons and it is from them the petitioners had subsequently purchased the goods. What in substance the learned counsel submits is that the property in the tram rails had in fact passed to Messrs. Kuppuswami Naicker and Sons and that thereafter the said Messrs. Kuppuswami Naicker and Sons sold the goods to the petitioners. In the light of the above submission, the facts of the case have to be looked at.

4. The Madras Electric Tramways Limited which was running the tramways in the city of Madras went into liquidation and an Official Liquidator was appointed in O.P. No .419 of 1953. In the course of those proceedings, this Court, on 5th August, 1955 directed that the Receiver for the debenture trustees should call for tenders by advertisement in "The Hindu" for the sale of the assets of the company. In pursuance of such an advertisement, Messrs. S.P. Kuppuswami Naicker and Sons wrote on 16th August, 1955 to the Solicitors of the Tramways Company giving an offer to purchase the assets of the company for a total sum of Rs. 5,51,111. In that offer they had valued the "tramway"..*i.e.*, rails, posts, cables, electrical equipment etc., at Rs. 2,01,111 and the other assets which mainly consisted of immoveable properties at Rs.3,50,000. The said Messrs. Kuppuswami Naicker and Sons had given an offer on 3rd August, 1955 earlier to the Court order and had actually deposited a sum Rs.50,000- as earnest money. Therefore, when they submitted their fresh and increased offer on 16th August, 1955 for Rs.5,51,111 they sent a cheque for Rs.6,000 which along with Rs.50,000 already deposited would make up a deposit of Rs.56,000. The Court considered all the offers on 19th August, 1955 and found that the offer of Messrs. Kuppuswami Naicker and Sons was most satisfactory. It, therefore, directed the Official Receiver to accept the said offer. The acceptance by the Official Reciver was duly communicated to Messrs. Kuppuswami Naicker and Sons by letter dated 23rd August, 1955. which was actually received by them on 26th August, 1955. On 26th August, 1955. a sum of Rs.1,95,111 was paid to the Receiver which with the sum of Rs.6,000 deposited along with the increased offer made on 16th August, 1955. represented the full purchase price of the tramways. Messrs. Kuppuswami Naicker and Sons were informed by a letter of even date that as purchasers of the Company's interest in the tramways they were free to negotiate with the Corporation of Madras for the dismantling and digging up the rails, posts, ete., and that

till their removal the materials will be lying at their risk. It is not in dispute that the sum of Rs.1,95,111 paid to the Receiver on 26th August,1955 came from the petitioners. Messrs. Kuppuswami, Naicker and Sons wrote to the Receiver on 26th August, 1965 that Bhagwan Motor Company will perform the terms of the sale agreement as their nominees and that they would arrange to take over the rails, posts and overhead wires etc., immediately after making arrangement with the Corporation of Madras. It is in the light of these admitted facts it has to be seen whether Bhagwan Motor Company are the purchasers of the tram rails from Messrs. Kuppuswami Naicker and Sons.

5. Bhagwan Motor Company was a partnershp concern consisting of four partners, (1) Narainsingh Ghanshamsingh, (2) P.K. Ramadoss, (3) Mohanlal Lakhrajmal, and (4) S.P. Kuppuswami Naicker and sons. S.P. Kuppuswami Naicker was running a sole proprietary concern under the name and style of Messrs. S.P. Kuppuswami Naicker and Sons and that concern was a partner in Bhagwan Motor Company. No doubt M/s. S. P. Kuppuswami Naicker and sons and Bhagwan Motor Company are two independent entities though the former happended to be a partner in the latter firm.

6. The Tribunal has taken the view that the offer made by Messrs. Kuppuswami Naicker and Sons to purchase the tramway was on behalf of the firm of Bhagawan Motor Company, that the sale ordered by the Court in favour of Messrs. Kuppuswami Naicker and Sons was for the benefit of the petitioner-firm, that the purchase of the tramway was by the firm is fortified by the fact that the sale consideration has been paid only by the petitioners though Messrs. Kuppuswami Naicker and Sons and that, therefore, it is not possible to assume that there were two sales, one by the Receiver to Messrs. Kuppuswami Naicker and Sons and the other from Messrs. Kuppuswami Naicker and sons to the petitioners. It is not in dispute that there was an argeement in September, 1955 between Messrs. Kuppuswami Naicker and Sons and the other partners of the petitioner-firm to the effect that Messrs. Kuppuswami Naicker and Sons were transferring their rights to the firm as their nominee and the firm alone should undertake the performance of the contract. Apart from this agreement, there is no proof that Messrs. Kuppuswami Naicker and Sons entered into any contract with the firm for the sale of the tramway lines. The learned counsel for the petitioners would, however, contend that the said agreement should be treated as a sale agreement under which the tramway lines which became the property of Messrs. Kuppuswami Naicker and Sons had been transferred to the petitioners. But the deed of dissolution dated 25th November, 1955 entered into between the partners of the petitioners' firm indicates that the assets of the Madras Electric Tramway Company were purchased for the partnership concern with the partnership funds. As already stated the sum of Rs. 1,95,111 had been paid from and out of the firm on 26th August, 1955, and it is seen that even the first deposit of Rs. 56,000 was made only by Narainsingh Ghanshamsingh, the managing partner of the firm though in the name of M/s. Kuppuswami Naicker and Sons. The accounts of the firm showed that on 20th August, 1955 they had paid Rs. 56,000 in respect of the purchase transactions of tramway lines by M/s. S. P. Kuppuswami Naicker and Sons. From these facts the Tribunal concluded that the purchase from Madras Electric Tramways was by the firm through its partner M/s. S. P. Kuppuswami Naicker and Sons and that, therefore, there is no question of any independent purchase by M/s. Kuppuswami Naicker and Sons from the Madras Electric Tramways and then a subsequent sale by M/s. S.P. Kuppuswami Naicker and Sons to the firm. The Tribunal recognised the fact that a partner of a concern can in law, sell goods to the firm, but it held that in this case the records clearly make out that the purchase of tramways was by the firm through the partner. The Tribunal also held that even if M/s. Kuppuswami Naicker and Sons can be deemed to be the purchasers, there has been no sale by them to the petitioners and the mere assignment of their rights to the petitioners as nominee will not amount to a " sale ",

that for constituting a sale, there should be an agreement between the parties to transfer property in the goods for money consideration and that there is no proof that M/s. Kuppuswami Naicker and Sons sold the goods to the petitioners for any consideration.

7. The learned counsel for the petitioners raises a two fold contention: (1) that the finding of the Tribunal that the purchase of the assets of the tramway lines by the petitioners was by the firm and not by M/s. Kuppuswami Naicker and Sons is unsupportable; and (2) M/s. Kuppuswami Naicker and Sons had in fact transferred the goods to the firm only after the property therein had passed to them and, therefore, the firm, should be taken to have purchased the goods only from M/s. Kuppuswami Naicker and Sons. It is pointed out on behalf of the petitioners that the earliest offer made by M/s. Kuppuswami Naicker and Sons was on 3rd August, 1955 and that offer having been made without reference to the firm or its managing partner, Narainsingh Ghanshamsingh, it must be taken that M/s. Kuppuswami Naicker and Sons had acted in their individual capacity in purchasing the tramway lines. Reference is also made to the payment of Rs. 50,000 as deposit on 3rd August, 1955 by M/s. Kuppuswami Naicker and Sons without reference to the firm or its managing partner.

8. Whatever might have happened before the advertisement, M/s. Kuppuswami Naicker and sons made an offer after the advertisement specifically making it clear that the sale should be either to them or to their nominees. Even the Court which accepted the offer made by M/s. Kuppuswami Naicker and Sons made it clear that the sale of the assets of the tramway company will be either to them or to their nominees. The accounts of the firm also show that not only the deposit amount of Rs. 56,000 but also the balance of the consideration for the tramway lines came from the petitioners' firm. This has also been made clear by the recitals of the dissolution deed dated 25th November, 1955 which specifically states that the assets of the tramway company were purchased for the firm. It cannot be forgotten that M/s. Kuppuswami Naicker and Sons are a partner in the firm and they are entitled to act on behalf of the petitioners' firm as such partner. Further, in the dissolution of partnership all the assets purchased from the tramway company were taken into consideration and the rights and liabilities of the partners were determined on that basis. As already stated, there is no material to show that M/s. Kuppuswami Naicker and Sons actually sold the tramway lines to the firm. As a matter of fact the learned counsel of the petitioners is not able to say as to what is the amount paid if any, by the firm to M/s. Kuppuswami Naicker and Sons as price for the goods. But he points out that the sum of Rs. 2,01,111 paid to the tramway company as price for the tramway lines should be taken to be the consideration both for their purchase from the tramway company and for their sale to the firm. We are of the view that the facts of this case clearly indicate that the purchase of tramway lines by M/s. Kuppuswami Naicker and Sons from the tramway company was really for the firm, that as the offer was made only in the name of M/s. Kuppuswami Naicker and Sons, the firm had been nominated in their place, that M/s. Kuppuswami Naicker and Sons did not become purchasers in their own right and that the firm, who is the nominee, is the actual purchaser. The Court order having sanctioned the sale either to the offeror or to his nominee, the nomination having taken place before the actual price was paid, the sale in this case should be taken to be a direct sale by the Receiver to the firm.

9. The second contention proceeded on the basis that M/s. Kuppuswami Naicker and Sons made their offer in their individual capacity and transferred the goods to the firm after the property in the goods purchased had vested in them. But as we have held that the purchase of tramway lines was only by the firm through Messrs. Kuppuswami Naicker and Sons, one of its partners, the above question does not arise for consideration at all.

10. The petitioners' learned counsel refers to the decision in *Bayyama Bhimayya*

v. *Government of Andhra Pradesh*[1], in support of his contention that the transaction by which the firm became the owner of the goods should be treated as comprising two sales. In that case a dealer in gunnies entered into contracts with two mills agreeing to purchase gunnies at a certain rate for future delivery either to him or to his nominee. The Mills, however, made it clear that they will have no privity of contract with the nominees and the dealer alone will be treated as their purchaser. Before the date of delivery the dealer entered into agreements with third parties by which he charged something extra from those third parties and handed over to them the delivery orders. The Mills delivered the goods to the third parties against such delivery orders. The dealer contended that there was one transaction of sale between the Mills and the third parties and that the transaction between himself and the third parties could not be treated as a sale. The Supreme Court held there were two transactions of sale, one by the Mills to the dealer and the other from the dealer to the third parties. But that was a clear case where the dealer had admittedly entered into sale transactions with third parties and handed over the delivery orders enabling them to take delivery of the goods from the mills, and the mills refused to recognise the third parties an the dealer's nominees for purposes of their sales to the dealer. In the instant case, as already stated, there is no evidence that M/s. Kuppuswami Naicker ard Sons entered into any sale transaction with the firm before nomination. Further, the Court specifically sanctioned the sale either to the offeror or to its nominee. We are, therefore, unable to invoke the principle laid down in that case. *State of Andhra Pradesh* v. *Kolla Sree Ramamurthy*[2], was also relied on. There a dealer in gunny bags had entered into contracts of purchase of gunry bags with manufacturers. In pursuance of those contracts goods had been appropriated and packed in bales by the manufacturers. The dealer also made a deposit of Rs. 15 per bale, but instead of taking delivery of the goods, he took a delivery order and endorsed the same to his purchasers. The question was whether the transaction entered into by the dealer with third parties under which the endorsed delivery orders were transferred for a price amounted to "sale of goods." The point urged was that the sale of the delivery order cannot be taken to be "sale of goods", and that as no goods had been appropriated to the contracts by the dealer with third parties before the delivery orders were endorsed, they will not amount to a sale of goods but were merely transfers of delivery orders as some paper. Their Lordships of the Supreme Court expressed the view that a delivery order is a document of title to goods, and the possessor of such a document has not only the right to take delivery of the goods but also has the power to transfer by endorsement for delivery. Even this decision proceeds on the basis that there was a sale transaction on the basis of which the delivery orders had been endorsed. But in the instant case there is no proof of any sale. Only if there is a sale transaction the question would arise whether the delivery of the goods effected by the tramway company to the firm would amount to two deliveries, one to M/s. Kuppuswami Naicker and Sons and the other from M/s. Kuppuswami Naicker and Sons to the firm. To invoke the principle laid down in that decision that two deliveries which are separate in point of fact and in the eye of law might synchronise in point of time, it should be shown that there are two sales. As already stated, we have absolutely no material to show that there was a sale from Messrs. Kuppuswami Naicker and Sons to the firm. If at all, there could have been only an assignment of the rights by M/s. Kuppuswami Naicker and Sons under the sale contract to the firm with the consent of the seller. But such an assignment of rights under the contract by itself will not come under the definition of "sale" unless it is the result of a sale transaction. In this view we have to uphold the view taken by the Tribunal in this case.

1. (1961) 12 S.T.C. 147 : (1961) 1 An.W.R. (S.C.) 196 : (1961) 1 M.L.J. (S.C.) 196 : (1961) 1 S.C.J. 636: (1961) 3 S.C.R. 267: A.I.R. 1961 S.C. 1065.
2. (1962) 13 S.T.C. 522 : (1963) 1 S.C.R. 184 : A.I.R. 1962 S.C. 1585.

11. The result is the tax case is dismissed with costs. Counsel's fee Rs. 150.

S. J. —— *Tax case dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*V. Ramaswami, J.*

R. China Boyan and others .. *Appellants**

v.

The Commissioner for Hindu Religious and Charitable Endowments, Madras and another .. *Respondents.*

Tamil Nadu Hindu Religious and Charitable Endowments Act (XXII of 1959), *section* 63 (a)—*Constitution of India* (1950), *Article* 26—*Suit for declaration—Temple—Right to manage—Whether vested with a particular community—Whether maintainable —"In accordance with law"—Meaning of—Right vested in a particular community—Whether can be taken away.*

A suit for a declaration that the right to manage and administer a temple and its properties is vested in a particular community is clearly maintainable. The jurisdiction of the Deputy Commissioner under section 63 (*a*) of Act XXII of 1959 was to decide whether an institution is a religious institution ; but it does not confer any power on him to decide whether it exclusively belongs to a particular community.

What Article 26 (*d*) of the Constitution of India provides is that the administration of the property shall be "in accordance with law." This could only mean that the administration and management could be regulated by law and there is no absolute right vested in a religious denomination in the matter of administration of the temple and its properties. But this, would not include a right to take away the entire right to management leaving a mere husk. Though "regulation" within the meaning of Article 19 might include a total deprivation of the right, in the context of Article 26 it would be difficult to hold that the law could take away the entire right or deprive the religious denomination of any right in the management of its properties. A law which takes away the right of administration from the hands of the religious denomination altogether and vests it in any other authority would amount to a violation of the right guaranteed under Article 26. [*Para.* 6.]

Cases referred to:—

Rao Saheb Dr. Ananda Baliga v. *Srimath Ananteswar Temple*, (1952) 1 M.L.J. 678 : 65 L.W. 450: A.I.R. 1952 Mad. 767 ; *Asarimar Samudayam* v. *Natarajan Asari*, (1973) 2 M.L.J. 306; *Sankarakumara Nadar* v. *Assistant Commissioner, Hindu Religious and Charitable Endowments*, (1975) 1 M.L.J. 12; *Santhana Gopala Chettiar* v. *Seetharama-Chettiar*, (1968) 2 M.L.J. 41; *Santhana Gopala Chettiar* v. *Seetharama Chettiar*, (1974) 1 M.L.J. 215; *Commissioner of Hindu Religious Endowments* v. *Sirur Mutt*, (1954) 1 M.L.J. 596 : 1954 S.C.R. 1005 : 1954 S.C.J. 335: A.I.R. 1954 S.C. 282; *Retilal Panchand Gandhi* v. *State of Bombay*, 1954 S.C.J. 480: (1954) 1 M.L.J. 718 : 1954 S.C.R. 1055: A.I.R. 1954 S.C. 388; *Mukundaraya Shenoy and others* v. *State of Mysore*, A.I.R. 1960 Mys. 18 ; *Muthiah Asari and others* v. *Madasami Asari and others*, (1965) 2 M.L.J. 220; *Durga Committee* v. *Hussain Ali*, (1962) 1 S.C.R. 383: A.I.R. 1961 S.C. 1402.

Appeal against the decree of the District Judge, Coimbatore (West) in Appeal Suit No. 33 of 1971, preferred against the decree of the Court of the II Additional Subordinate Judge, Coimbatore in Original Suit No. 342 of 1967.

N. Vanchinathan, for Appellants.

The Additional Government Pleader, for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiffs are the appellants. They filed the suit in a representative capacity, representing the Boyar community people residing in five groups of villages which are set out in the plaint. The relief asked for in the suit was a declaration that Sri Devi Badra Kaliamman Temple at Gettimmallan-

* S.A. No. 2003 of 1973. 10*th March*, 1975.

pudur, hamlet of Ambarampalayam village, Pollachi Taluk, Coimbatore district, is a religious denominational institution belonging to the religious denomination of the Boyar community residing in the said five groups of villages and that they are entitled exclusively to conduct and manage the affairs of the said temple and to restrain the defendant, their agents, servants and men by a permanent injunction from in any way interfering with the possession, management and administration of the said temple by the plaintiffs. The facts as found by the Court below were these : The said temple was founded by the Boyar community residing in the said five groups of villages a few decades ago and ever since the foundation of the temple, it is only that community people who have been controlling and managing the institution. The trustees of the institution were elected by the villagers belonging to the said community. Plaintiffs 1 to 5 were elected on 16th July, 1957. The income of the temple mainly consisted of the *undial* collections. Sometimes the trustees appoint committees for the collection of funds and they collect usually at the rate of Re. per annum from every male major member of the community. One of the trustees is elected by the trustees as their Managing Trustee who is vested with the responsibility for having the pooja conducted in the temple by appointing poojaris etc. The income received in the *undial* and the collections made were used solely for meeting the expenses of the temple. Though it was further claimed in the plaint that the elected trustees were holding their office for their lives and the managing trusteeship was hereditary, it was not necessary for deciding the suit on these points and the Courts below also have not given any finding. On these facts, the Courts below held that the suit institution is a religious denomination within the meaning of Article 26 of the Constitution.

2. This finding was not challenged by the Department or the second defendant even in the appeal before the lower appellate Court and therefore we have to proceed on the basis that the suit institution is a religious denomination within the meaning of Article 26 of the Constitution.

3. The first defendant is the Commissioner, Hindu Religious and Charitable Endowments. In the written statement, the main plea taken was that the suit was not maintainable in view of the provisions of section 108 of Tamil Nadu Hindu Religious and Charitable Endowments Act (XXII of 1959) (hereinafter referred to as the present Act). This contention was accepted by both the Courts below and the suit was held not maintainable. The first question for consideration is whether the present suit for a declaration that the suit institution is a religious denomination within the meaning of Article 26 of the Constitution and that the right to manage and administer the temple and its properties is vested in the Boyar community residing in the five groups of villages, was not maintainable in view of the provisions in the present Act. It is necessary to deal now with the provisions in the Act itself before considering the cases decided on the subject.

4. Section 108 of the Act bars a suit or other legal proceedings in respect of the administration or management of a religious insitution or any other matter or dispute, for determining or deciding which provision is made in the Act, except under and in conformity with the provisions of the Act. Section 63 (*a*), which was relied on by the department provides that the Deputy Commissioner, shall have power to enquire into and decide whether an institution is a religious institution. "Religious institution" is defined in section 6 (18) as meaning a mutt, temple or specified endowment. "Temple" is defined as a place, by whatever designation known, used as a place of public religious worship and dedicated to or for the benefit of or used as of right by the Hindu community or any section thereof as a place of public religious worship. What is meant by the words "religious denomination" under Article 26 of the Constitution, had come up for consideration in a mumber of cases and it is not necessary for the purpose of the present case to deal with those cases. Suffice it for the prupose of the present discussion to state that it is a section of the public having a common faith and organization and designated by a

distinctive name. Therefore, an institution established or maintained by that section of the Hindu community would be one that would be covered by Article 26 of the Constitution. The definition of "temple", as seen already, would also include a place of public worship used as of right by a section of the Hindu community. But, on this reasoning, it could not be said that the Deputy Commissioner will have jurisdiction under section 63 (*a*) to decide whether the institution is a religious denominational institution falling under Article 26 of the Constitution. The jurisdiction of the Deputy Commissioner under the section was to decide whether an institution is a religious institution; but it does not confer any power on him to decide whether it exclusively belongs to a particular religious denomination. This has been so held in a number of cases, the earliest of which is the one decided in *Rao Sahib Dr. Ananda Baliga* v. *Srimath Ananteswar Temple*[1], That case arose under the Madras Hindu Religious Endowments Act, 1926 (II of 1927) (hereinafter referred to as the 1927 Act). But, section 84 (1) of the 1927 Act, corresponding to section 63 (*a*) of the present Act, was substantially the same and enabled the Endowment Board to decide whether an institution is a math or temple as defined in the Act. Instead of the words "math or temple", in section 63 (*a*), the words "religious institution" are used, and a religious institution is defined in section 6 as meaning math or temple. Sections 79 and 79-A of the 1927 Act also conferred jurisdiction on the Board to decide any dispute as to the existence of any usage of a math or temple or the rights, honours, emoulments and perquisites to which any person may by custom or otherwise be entitled in such math or temple. The corresponding provision in the present Act is section 63 (*e*). The 1927 Act also contained a provision barring the suit with respect to matters which are to be decided under the Act. Considering the scope of these provisions, this Court held that the jurisdiction of the Board to decide was only whether the particular institution is a math or temple as defined in the Act and that would not include a case where the question for consideration is whether the temple is exclusively owned by a particular religious denomination. Sections 79 and 79-A were also held not intended to provide a forum for the determination of the denominational rights of the community over the temple. In the instant case also, there is no dispute that the suit temple is a religious institution within the meaning of that expression in the Act. But, what was contended by the plaintiffs was that it exclusively belonged to the Boyar community of the five groups of villages. The suit was therefore clearly maintainable. A similar view was taken by Ramanujam, J., in *Asarimar Samudayam* v. *Natarajan Asari*[1], and a Division Bench of this Court in *Sankarakumara Nadar* v. *Assistant Commissioner, Hindu Religious and Charitable Endowments*[2], The decision of Ismail, J., in *Santhanagopala Chettiar* v. *Seethárama Chettiar*[3], relied on by the Courts below, has since been reversed in the decision in *Santhanagopala Chettiar* v. *Seetharama Chettiar*[4],and therefore the decisions of this Court are now uniformly in one direction and there is no contrary view expressed by any of the learned Judges. We have, therefore to hold that the suit is maintainable.

5. The next question that arises for consideration in this case is whether the injunction prayed for in the suit could have been granted. The allegations in the plaint with respect to this prayer are as follows : At the instance of the second defendant, the Inspector of the Hindu Religious and Charitable Endowments Department, Pollachi sealed the temple *undial* and prevented the plaintiffs from using the money for the expenses of the temple. Further on 24th January, 1963 the Assistant Commissioner, Hindu Religious and Charitable Endowment, called for applications for appointment of trustees to the temple and he followed that up with a letter on 24th March, 1973 to the first plaintiff, calling for objections, if any

1. (1952) 1 M.L.J. 678 : 65 L.W. 450 : A.I.R. 1952 Mad. 767.

1. (1973) 2 M.L.J. 306.
2. (1975) 1 M.L.J. 12.
3. (1968) 2 M.L.J. 41.
4. (1974) 1 M.L.J. 215.

The plaintiffs sent a lawyer's notice contending that they are the legally elected trustees and that the department has no right to appoint trustees for the temple since it is a religious denominational institution falling within the scope of Article 26 of the Constitution. On the apprehension that the department would proceed with the appointment of trustees, they have prayed for an injunction restraining them from interfering with the possession, management and administration of the said temple. Since the second defendant claimed that he was appointed as the fit person by the area committee, he was also impleaded as a defendant in the suit. The contention of the learned counsel for the department was that the department was entitled to appoint trustees even in respect of religious denominational institutions and that no injunction could be granted. In this connection, he relied on the provisions in sections 46, 47, 49 and 51 of the present Act.

6. It was claimed that in respect of institutions, where hereditary right of trusteeship is claimed, the Deputy Commissioner is entitled to decide whether the office was hereditary and whether the person was entitled to be declared as a hereditary trustee. In respect of institutions where there is no hereditary trustee, the Commissioner, or the Assistant Commissioner, as the case may be, could appoint non-hereditary trustees. I am unable to agree with this contention of the learned counsel. Article 26 of the Constitution guarantees every religious denomination, subject to public order, morality and health, the right (*a*) to establish and maintain institutions for religious and charitable purposes ; (*b*) to manage its own affairs in matters of religion ; (*c*) to own and acquire movable and immovable property; and (*d*) to administer such property in accordance with law. The rights in clauses (*a*) and (*b*) are in absolute terms, except that they are subject to public order, morality and health. But, the rights under clauses (*c*) and (*d*) could be regulated by law. It has been held in a number of cases that the guarantee of management of its own affairs in the matter of religion, provided under Article 26 (*b*), is restricted to matters of religion alone, and matters relating to administration of property would be governed only by clause (*d*). It was the contention of the learned counsel for the department that since administration and management of the temple and its properties could be subjected to law, the Commissioner or the Assistant Commissioner, as the case may be, would be entitled to appoint trustees and no injunction shall be granted. What Article 26 (*d*) provides is that the administration of the property shall be in accordance with law." This could only mean that the administration and management could be regulated by law and there is no absolute right vested in the religious denomination in the matter of administration of the temple and its properties. But, this, in my opinion, would not include a right to take away the entire right of the a denomination or to substantially take away the right to management leaving a mere husk. Though "regulation" within the meaning of Article 19 might include a total deprivation of the right, in the context of Article 26 it would be difficult to hold that the law could take away the entire right or deprive the religious denomination of any right in the management of its properties. In fact, in the decisions of the Supreme Court in *Commissioner of Hindu Religious Endowments* v. *Sirur Mutt*[1], and in *Retilal Panachan Gandhi* v. *State of Bombay*[2], it was held that though a law might regulate the administration of a math, it must leave the administration to the religious denomination to which the math belonged for the law which took away the right of administration from the hands of the religious denomination and vested it in any other body would be void. It is true that sections 46,47, 49 and 51 are so sweeping in language that it is possible of interpretation as if the power is vested in the Assistant Commissioner or the Commissioner, as the case may be, for appointment of trustees even in the case

1. (1954) 1 M.L.J. 596:(1954) S.C.R. 1005: 1954 S.C.J. 335: A.I.R. 1954 S.C. 282.
2. 1954 S.C.J. 480 : (1954) 1 M.L.J. 718: (1954) S.C.R. 1055: A.I.R. 1954 S.C. 388.

of religious denominational institutions coming within the scope of Article 26. But, section 107 of the present Act specifically provides that nothing in this Act shall be deemed to confer any power or impose any duty in contravention of the rights conferred on any religious denomination or any section thereof by Article 26 of the Constitution. We have,therefore to interpret these provisions so as to be in conformity with Article 26 of the Constitution and we shall not give any construction which will amount to a contravention of the constitutional prohibition itself. I am, therefore, of opinion that the Assistant Commissioner in this case had no power to appoint trustees for these institutions. A similar view was taken by a Division Bench of the Mysore High Court in *Mukundaraya Shenoy and others* v. *State of Mysore*[1]. It was held in that case that under Article 26 (*d*), it is the fundamental right of the religious denomination to administer its properties in accordance with law and therefore the law must leave the right of administration to the religious denomination itself subject to such restrictions and regulations as it might choose to impose. A law which takes away the right of administration from the hands of the religious denomination altogether and vests it in any other authority would amount to a violation of the right guaranteed under Article 26. This decision was followed by Division Bench of this Court in *Muthiah Asari and others* v. *Madasami Asari and others*[2]. It was further held in this case that even the fact that the area committee purported to nominate the members of the particular religious denomination as trustees would not be enough to cure the vice or infirmity if otherwise the right guaranteed to this body under Article 26 (*d*) were effectively taken away by the nomination. The Supreme Court also, in *Durga Committee* v. *Hussain Ali*[3], observed :

> "If the right of a denomination or a section of such denomination is adversely affected by the statute, the relevant provision of the statute must be struck down as a whole and in its entirety or not at all....In other words, the infirmity or the vice in the statute cannot be cured by confining the members of the proposed committee to the denomination itself."

In the circumstances, therefore, the attempt on the part of the first defendant to appoint trustees in respect of the suit institution in the place of the plaintiffs was against the constitutional guarantee under Article 26 (*d*) and therefore, the plaintiffs were entitled to the injunction prayed for. But this shall not prevent the Department from exercising such of the powers which are conferred on them by law in regard to the administration of institution.

7. The second appeal is accordingly allowed and the judgments and decrees of the Courts below are set aside and the suit is decreed as stated above. There will be no order as to costs. No leave.

S.J. —— *Appeal allowed.*

1. A.I.R. 1960 Mys. 18.
2. (1965) 2 M.L.J. 220.
3. (1962) 1 S.C.R. 383: A.I.R. 1961 S.C. 1402.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Maharajan, J.*

Adaikappu Chettiar *Appellant**

v.

Ayesha Natchiar *Respondent.*

Civil Procedure Code (*V of* 1908), *section* 9—*Mortgage under French law—Holder enjoying a privilege—Suit filed under Indian law—Whether correct.*

A holder of a mortgage, although it has been granted under the French Law and procedure, is certainly entitled under the Civil Procedure Code to file a suit in accordance with the procedure thereof. [*Para.* 6]

When a person, who enjoyed a privilege, filed a suit in the ordinary civil Court on foot of a notarial mortgage deed, it is the plain duty of the Court to entertain it under section 9 of the Indian Civil Procedure Code. [*Para.* 6]

* Appeal No. 12 of 1972 (p) *20th February*, 1975.

Even though the plaintiff might have had the alternative relief of enforcing the mortgage as if it were a decree without resorting to an action in a civil Court, undoubtedly the plaintiff shared with the other Indian citizens the right to file a suit on the mortgage deed in a civil Court, obtain a decree and then proceed to execute it. [*Para.* 6.]

Case referred to :—

Susema Bala v. *Bibhuti Bhusan*, A.I.R. 1973 Cal. 295.

Appeal against the decree of the Court of the Subordinate Judge of Karaikal dated 30th April, 1971 and passed in Original Suit No. 22 of 1970.

P. Balasubramaniam, S. V. Jaya Raman and *V. Kannan*, for Appellant.

K. Yamunan, for Respondent.

The Court delivered the following

JUDGMENT.—This is an appeal filed by the defendant against the judgment of the learned Subordinate Judge of Karaikal decreeing the plaintiff's suit on foot of a mortgage executed by the defendant in favour of the plaintiff, and granting a preliminary decree in her favour. The defendant in his answer contended that the mortgage was unsupported by consideration to the extent of Rs. 1,400. He also pleaded partial discharge. The Court below rejected the evidence of the defendant, accepted that of the plaintiff and fully decreed the plaintiff's claim.

2. The first point that arises for determination is whether the suit mortgage is unsupported by consideration to the tune of Rs. 1,400. Exhibit A-1 is the notarial deed of mortgage admittedly executed by the defendant in favour of the plaintiff on 29th September, 1965 for Rs. 11,400. In this document the defendant has clearly admitted that he received the entirety of this amount "out of the view" of the Notaire and the attestors to the document. His present contention is that a sum of Rs. 1,400 out of the sum of Rs. 11,400 was retained by the plaintiff for adjustment of future interest at a higher rate. The plea was not put forward by him, on his receipt of the notice, which the plaintiff sent the defendant prior to the suit. In fact, the defendant did not care to reply to the plaintiff's notice at all. What is worse, the defendant's own account book Exhibit B-2 says that on 28th September, 1965, that is to say, a day prior to the execution of Exhibit A-1, he received the entire sum of Rs. 11,400 from the plaintiff. Nothing could be more disastrous than this written admission in the defendant's own account book. The Court below rightly rejected the defendant's case in this behalf.

3. The second point that arises for determination is whether the partial discharge pleaded by the defendant is true. According to the defendant, he paid a sum of Rs. 1,824 towards the suit bond on 1st February, 1968 and at that time a further sum of Rs. 798 was surreptitiously collected by the plaintiff from the defendant on account of advance interest for a future period. The admitted endorsement on the bond shows that one Savarirajan paid a sum of Rs. 1,824 to the plaintiff on 1st February, 1968 and made an endorsement to that effect on the bond and that one Swaminathan wrote out this endorsement. Neither Sowrirajan nor Swaminathan has been put into the witness box to speak to the story that a pie more than Rs. 1,824 was paid by the defendant to the plaintiff on that date. The defendant's own account Exhibit B-2 shows that only a sum of Rs. 1,824 was paid towards the bond on 1st February, 1968. When asked to explain why the alleged additional payment of Rs. 798 was neither endorsed on the bond nor entered in the defendant's own account book, the learned Counsel for the appellant submitted that though it has not been entered in the account book on 1st February, 1968 it has been entered on 4th July, 1969, that is to say, one year and, five months later. I find that the entry dated 4th July, 1969 shows that a sum of Rs. 798 was paid, not to the plaintiff but to one A. M. S. Arunachala. Arunachala has not been examined. Further, there is no receipt to vouch the alleged payment. The entry Exhibit B-3 does not show that it relates to the suit document, and even if it did, the belatedness of the entry remains unexplained. The entry being unilateral has been rightly rejected by the Court below.

4. It is next contended that the defendant has paid a sum of Rs. 1,000 towards the bond on 26th February, 1969. One wonders why this payment has not been endorsed on Exhibit A-1, in the manner in which the payment of Rs. 1,824 was endorsed. No receipt was also obtained from the plaintiff in respect of this payment' The uncorroborated and unilateral entry made by the defendant in his own account book has no evidentiary value, and it has been rightly discredited by the Court below. This point is answered against the appellant.

5. Learned counsel foi the appellant raises for the first time before me a plea of law which was not raised either in the pleading or in the Court below. According to the learned counsel, the hypothecation bond executed before the notaire was executable straightaway under the French law without any suit being filed, any decree being obtained thereon, and the Court below therefore had no jurisdiction to entertain the suit on the mortgage. The suit was filed on 9th July, 1970 after the introduction of the Indian Civil Procedure Code on 5th September, 1968. The mortgage bond was executed on 29th September, 1965, when the French Code Civil and the Code De Procedure Civile were in full force. The law by which the Indian Civil Procedure Code and certain other Indian enactments were extended to Pondicherry is the Pondicherry (Extension of Laws) Act, 1968. Section 4 (1) of that Act says that any law in force in Pondicherry or any area thereof corresponding to any Act referred to in sub-section (1) of section 3 or any part thereof (except in so far as such law continues to be applicable to Benoncants) shall stand repealed as from the coming into force of such Act in Pondicherry. Clause (2) of section 4 says that nothing in sub-section (1) shall affect (*a*) the previous operation of any law so repealed or anything duly done or suffered thereunder; or (*b*) any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or (*c*) any penalty, forfeiture or punishment incurred in respect of any offence committed against any law so repealed; or (*d*) any investigation, legal proceeding or remedy in respect of any such right privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if this Act had not been passed. The proviso to section 4 runs as follows:—

> "Provided that anything done or any action taken (including any appointment or delegation made, notification, instruction, or direction issued, form, bye-law or scheme framed, certificate obtained, permit or licence granted, or registration effected) undei any such law, shall be deemed to have been done or taken under the corresponding provision of the Act extended to Pondicherry by this Act and shall continue to be in force accordingly unless and until superseded by anything done or any action taken under the said Act".

6. Under the French Law, a grosse copy of a notarial mortgage deed could be executed as if it were a decree granted by a Court of law. There was no need under the French system for the mortgagee to file a suit, pay Court-fee on the plaint, obtain a preliminary decree and then a final decree and then put that final decree in execution against the hypotheca. The notarial mortgage deed could be entrusted straightaway to a 'huissier' and executed in accordance with the French Procedure, the details of which I need not go into now. The question arises whether after the French Procedure Code was replaced by the Indian Civil Procedure Code, a person in the situation of the plaintiff, holding a grosse copy of a notarial mortgage deed is disentitled under the Indiant law to file a plaint on foot of the deed paying Court-fee thereon and obtain a decree in accordance with the Indian Civil Procedure; but should proceed to enforce the notarial bond straightaway. In fact, learned counsel for the appellant went the length of saying that the Civil Court would have no jurisdiction to entertain the suit filed by the holder of a notarial mortgage deed on foot thereof. I am entirely unable to agree. The question whether plaintiff was

entitled to execute the notarial mortgage deed without obtaining a decree thereon is one which does not call for adjudication in this appeal, though it may not be irrelevant to refer to a Full Bench decision of the Calcutta High Court in *Susema Bala* v. *Bibhuti Bhusan*[1]. There it has been held that a grosse copy of a notarial mortgage deed could be executed even after the Indian law has come into force without a decree being obtained. According to the Full Bench of the Calcutta High Court, the right obtained under the grosse copy of the notarial mortgage deed is a substantive right and not a procedural one and it must be preserved under the Indian Law after the merger. According to the learned Judges, a person in the position of the plaintiff could execute Exhibit A-1 as if it were a decree by filing an execution petition in the Indian Court, and praying for the sale of the hypotheca straighaway. Upon this question, I do not wish to pronounce any opinion. The distinction between substantive rights recognised by French Law and mere procedural rules of French Law will have to be drawn sagaciously with regard to the relevant circumstances of each case and the distinction cannot be exhaustively illustrated *in vacuo*. For instance, the requirement of French Law that notice of the deposit of "Cahierdes charges" shall be served on the debtor and all the creditors and other persons mentioned in Article 692 of the Code de Procedure Civile is a matter of substance and ought to be complied with by the Indian Court acting within the framework of the Indian Civil Procedure Code. But the requirement of the French Law that the service of notice, shall be effected through huissiers is merely a procedural matter, which the Indian Courts can ignore. No litigant can be heard to say that service by process-servers under the watchful supervision of the Indian Courts is less efficacious than service by French huissiers. There may, however, be intermediate cases such as the imposition of time limits by French Law with reference to service of notices. It is for the Judges to consider judicially whether such time limits affect the substance of the thing or are merely procedural in character. The 'substantive' may shade off by imperceptible degrees into the 'procedural' and it is for the Court to draw the line between the two, remembering the purpose of the distinction. The right to execute a notarial mortgage deed straight away without filing a plaint paying Court-fee, obtaining decree and exposing the claimant to the dilatory tactics of his opponent is, I fancy, a valuable right and a substantive right. But the question is whether the holder of a copy of a notarial mortgage deed is confined under the Indian Law to the remedy which he had under the French Law. What section 4 (2) of the Pondicherry (Extension of Laws) Act, 1968 says is that nothing in sub-section (1) shall affect any right, privilege, obligation, etc., acquired or accrued under the French Law that has been repealed. There is nothing in this section which shuts out the person who has acquired such a right under the French Law from the portals of the Indian Courts and from the remedy to which, under the Civil Procedure Code and under the Indo-Anglian system of jurisprudence he would undoubtedly be entitled to. A holder of a mortgage, although it has been granted under the French Law and procedure, is certainly entitled under the Civil Procedure Code to file a suit in accordance with the procedure thereof. Section 9 of the Civil Procedure Code says that the Court shall subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognisance is either expressly or impliedly barred. It is not contended by the learned counsel for the appellant that the suit filed by the plaintiff in the Court below is not a suit of a civil nature. What he contends is that inasmuch as the plaintiff had an alternative remedy under the French Law to proceed to enforce the notarial mortgage deed without resort to a Court of law, it is not competent for him to file a suit on Exhibit A-1 in the Indian Court and obtain a decree in accordance therewith. It is indeed an irony that this argument should come out of the mouth of the defendant who has fully exploited the opportunity given to him by the plaintiff.

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1. A.I.R. 1973 Cal. 295.

If the plaintiff has chosen to enforce her privilege under the French Law by putting the notarial mortgage deed in execution straightaway, the defendant would not have had the opportunity of dragging on the proceedings for nearly five years and raising the defences which under the French Law he could not raise. What section 4 of the Pondicherry (Extension of Laws) Act, 1968 does is not to shut out the erstwhile French citizen from having resort to the Indian Civil Court but to protect and preserve whatever rights and privileges he might have had under the French Law, which has been repealed. When a person who enjoyed such a privilege, filed a suit in the ordinary civil Court on foot of a notarial mortgage deed, it is the plain duty of the Court to entertain it under section 9 of the Indian Civil Procedure Code. The argument that the Court has no jurisdiction to entertain the suit or that the plaintiff has no remedy open to her under the Indian Law by way of enforcing the mortgage in an action of this kind is to disregard the nature and amplitude of the saving provisions of the Pondicherry (Extension of Laws) Act, 1968. I have little hesitation in rejecting this contention of the appellant and in holding that even though the plaintiff might have had the alternative relief of enforcing the mortgage as if it were a decree without resorting to an action in a civil Court, undoubtedly she shared with the other Indian Citizens the right to file a suit on the mortgage deed in a civil Court, obtain a decree and then proceed to execute it.

7. It was lastly argued by the learned counsel for the appellant that costs ought to have been awarded by the Court below on an admission scale so far as the sum of Rs. 10,000 is concerned and on the contested scale only in respect of the balance of the plaintiff's claim. Having regard to the nature of the pleas raised by the defendant in the Court below, I do not think it right to interfere with the discretion of the Court below in awarding costs. Further, it is not as if the defendant confessed judgment in respect of the entire claim of the plaintiff. I am unable to hold that the Court below exercised its discretion unjudiciously while fixing the scale and quantum of costs payable by the defendant.

8. In the result, the appeal fails and the same is dismissed with costs.

S.J. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—*G. Ramanujam, J.*

Dr. K. Ramanujam .. *Petitioner**

v.

The Accommodation Controller, Club House Road, Madras-2 and another .. *Respondents.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), section 12 (1)—Application by landlord—Release of portion of building by Government for repairs—Subsequent application by landlord for release of portion for personal occupation—Tenability.

It is for the petitioner (landlord) to decide as to what accommodation or what house he should have for purposes of his residence or for the residence of the members of his family, and he or the members of his family cannot be forced to live in a portion of the premises against their will. Government's refusal to release the portion in question is not justified.

[*Para.* 6.]

Case referred to :—

Mullaikodi Ammal v. *Government of Tamil Nadu*, (1971) 2 M.L.J. 449 : A.I.R. 1972 Mad. 132: (1972) Ren.C.J. 274.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a Writ of *certiorari* calling for the records in G.O. Rt. No. 2763 on the file of the 2nd respondent and A. 5 14339 of 1971 on the file of the 1st Respondent and quashing the order

* W.P. No. 2569 of 1972. *4th March*, 1975

dated 22nd June, 1972 in G.O.Rt. No. 2763 and the consequential order of allotment passed by the 1st respondent in A-5. 14339 of 1971 dated 4th August, 1972.

E.R. Krishnan and *R. Srinivasan*, for Petitioner.

S. Ramalingam, Assistant Government Pleader, for Respondent.

The Court made the following

ORDER.—The petitioner is the owner of premises, Old No. 9 and new No. 10, Doraiswami Road, T. Nagar, Madras-17. The above premises comprises of two portions, one in front side and one in back side, each having a first floor. The front portion was originally allotted by the Accommodation Controller to one K. Sivarajan. The back portion was occupied by a private tenant. The petitioner filed an eviction petition against the said tenant on the ground of owner's occupation and ultimately got possession. This portion was subsequently occupied by the petitioner's son and daughter after notifying the vacancy to the Accommodation Controller.

2. On 21st July, 1970, the petitioner applied to the first respondent to release the front portion to enable him to effect certain substantial repairs. The first respondent, by his order dated 20th August, 1971, released the front portion under section 12 (1) (*a*) of the Madras Buildings (Lease and Rent Control) Act. After such a release, the petitioner effected certain repairs and structural alterations and thereafter applied to the Government the second respondent, for release of the front portion for his personal occupation. The second respondent, however, rejected that request by its order dated 22nd June, 1972. The petitioner challenges the validity of the said order rejecting his request for release of the building for his own occupation.

3. The impugned order rejecting the petitioner's request for release of the building for owner's occupation sets out two grounds; (1) the landlord's unemployed son, and his daughter are occupying the rear portion of the premises and the accommodation available in the above portion is sufficient for their needs, and (2) the landlord owns another house at No. 8, Neelakanta Mehta Street and if he is keen in providing better accommodation to his son and daughter, he could have taken action to vacate the tenant in the above premises and accommodate his son and daughter therein.

4. According to the learned counsel for the petitioner, the two reasons set out in the impugned order for rejecting the petitioner's request for release of the building are not tenable in law, and, therefore, the impugned order should be quashed. He contends that the basis on which the impugned order proceeds is that the petitioner's son and daughter alone are living in the back portion and that the accommodation therein is quite sufficient for them. It is pointed out that basis is erroneous. It is said that the limited accommodation in the back portion is not sufficient for the petitioner's son and his daughter, who is living with her husband, mother-in-law, and her children, and that, therefore, the reasoning given in the impugned order that the accommodation in the back portion is sufficient for the petitioner's son and daughter is vitiated. It is also pointed out that the other reason given in the impugned order that if the petitioner wants, he could evict the tenant in another house to accommodate the petitioner's son and daughter is equally untenable, for it is not for the respondents to say in which house the petitioner or his son and daughter should live. The learned counsel in this connection, refers to the decision of Ramaprasada Rao, J., in *Mullaikodiammal* v. *Government of Tamil Nadu*[1]. In that case, the Government proceeded on the basis of the report of the Accommodation Controller that the accommodation available for the landlady in that case was sufficient and that she may not require additional accommodation. Dealing with the question as to whether the Government could judge as to what accommodation is sufficient for the landlady, the Court expressed the view that it is for the landlord to judge for himself as to what portion is suitable for his residence and for the residence of the members of his family and that it is not for the

1. (1971) 2 M.L.J. 449: (1972) Ren.C.J. 274: A.I.R. 1972 Mad. 132.

department or any one to dictate, and that the requirement of the landlord or landlady has to be judged from their standpoint and it is not for the Accommodation Controller to say as it what is the accommodation required for the family of the landlord or the landlady.

5. In this case, the petitioner, at the time of filing the application for release, has pointed out to the Government that along with his son, who is living in the premises, his daughter also has to live with her husband, and that the downstairs portion is required for the accommodation of his son, while the upstairs portion is required for accommodation of his daughter and her husband. Though the report of the Accommodation Controller on which the Government order is based says that the landlord's son and daughter are now residing in the rear portion of the premises, which is spacious enough for their use and occupation, the report of the Accommodation Deputy Tahsildar, who made a local inspection of the premises in question, says that the petitioner's unmarried son is residing in the rear portion of the premises and along with him, the petitioner's daughter, her husband, their young children and her mother-in-law, are residing. It is also stated that the petitioner's other sons, who are studying in the Christian College are frequent visitors to the premises. This report shows that there are more than six members living in the rear portion and the statement of the Accommodation Controller that the landlord's son and daughter alone are residing in the rear portion is not correct. Apart from referring to the Accommodation Controller's report, it does not appear that the second respondent considered independently the question of petitioner's requirement of the premises for his own occupation.

6. In my view the two reasons given for the rejection of the petitioner's request for release of the building for his occupation are not tenable and, therefore, the order of the first respondent stands vitiated. As pointed out in the above judgment of Ramaprasada Rao, J., it is for the petitioner to decide as to what accommodation or what house he should have for purposes of his residence or for the residence of the members of his family, and he or the members of his family cannot be forced to live in a portion of the premises against their will.

7. Besides, there is one more circumstance which makes the request of the petitioner for release of the building still mere genuine and pressing. The petitioner has now filed an affidavit before this Court to the effect that he is about to retire in March, 1975 as the Deputy Director of the Central Leprosy Research Institute, Thirumani, Chingleput District and that he has come over to Madras and is living in the same premises, preparatory to retirement from 2nd December, 1974. This is an additional reason as to why the petitioner's request for release of the building should be considered favourably. The result is, the Writ Petition is allowed and the Rule *nisi* is made absolute. There will be no order as to costs.

S.J. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :- *S. Natarajan, J.*

R. Muthammal .. *Petitioner**

v.

Narmada and others .. *Respondents.*

Tamil Nadu Court-fees and Suits Valuation Act (XIV of 1955), section 40 (1)—Suit for partition — Compromise decree — Subsequent suit for declaration and other reliefs regarding some properties—Compromise decree not set aside and attacked as ab initio *void—Suit whether maintainable—Plaintiff whether liable to pay Court-fee for setting aside the compromise decree.*

From the wording of section 40 (1) of the Tamil Nadu Court-fees and Suits Valuation Act it may be seen that drastic change has been made in the matter of payment of Court-fee in respect of suits where cancellation of a decree for money or other property having a money value or other document which purports or operates to create, declare, assign, limit or extinguish any right, title or interest in money, moveable or immovable property is asked for. Undoubtedly, a compromise decree passed

*C.R.P. No. 2635 of 1973. *7th March, 1975.*

in a partition suit is a document which purports or operates to create, declare and assign the right, title and interest of the parties in the properties involved in the suit. Hence, unless that compromise decree is set aside, the plaintiff, will not be entitled to ask for the reliefs of declaration, partition and possession. [*Para.* 10.]

In the instant case, the compromise decree in the earlier action was not one rendered by the Court on merits, but was one rendered on a compromise entered into by the parties. The compromise decree may well partake the characteristics and incidents of a family arrangement. The compromise arrived at in the earlier suit may have been the result of a family arrangement between all the parties concerned. There is no bar in law to the members of a joint family including an illegitimate son of one of the co-parcerers to the benefit of a partition, and as such there can be no bar to an illegitimate son being given properties in the compromise arrived at in the earlier suit. In view of this, it necessarily follows that the plaintiff must have the compromise decree set aside before she can ask for the relief of declaration, partition and possession.

[*Para.* 11.]

Cases referred to :

Arunachalam Chetty v. *Rangaswami Pillai*, I.L.R. (1915) 38 Mad. 922 (F.B.) : 28. M.L.J. 118 : 28 I.C. 79 ; *Adinarayona* v. *Rattamma*, (1944) 1 M.L.J. 497 : 57 L.W. 392 : A.I.R. 1944 Mad. 408 (2); *Hameed Rowther* v. *Mohideen Pichai*, (1944) 2M L J. 33: 216 I.C. 192 : A.I.R. 1948 Mad. 451 ; *Ramabharosa Lal* v. *Bindi Devi*, A.I R. 1966 Pat. 203 ; *Somasundaram Pillai* v. *Janaki Ammal*, (1955) 68 L.W. 144 : (1955) 1 M.L.J. 310 ; *Abdulla* v. *Subramanyan Pattar*, (1936) 71 M.L J. 383 : 43 L.W. 715 : A.I.R. 1936 Mad. 470 ; *Azima Bi* v. *Zohara Bi*, (1949) M.W.N. 681 : (1949) 2 M.L.J. 533 : A.I.R. 1950 Mad. 190 ; *Akhandala* v. *Damodara*, (1952) 2 M.L.J. 145 : A.I.R. 1952 Mad. 810 ; *Asaram* v. *Ludheshwar*, A.I.R. 1938 Nag. 335 ; *Prem Prakash* v. *Mohan Lal*, A.I.R. 1943 Lah. 268 ; *Bosant Lal* v. *Rameshwar Prasad*, A.I.R. 1957 All. 287 ; *Suk Dev Sahi* v. *Ka il Devi Singh*, A.I.R. 1960 Cal. 597 ; *Ram Kishun* v. *Smt. Nere Devi*, A.I.R. 1965 Pat. 486 ; *K.H. Md. Ishaque Sahib* v. *H. Md. Saddiq Sahib*, (1970) 1 M.L.J. 207 ; *Ramanathan* v. *Ramanathan*, (1946) 2 M.L J. 114 : 59 L.W. 411 : A.I.R. 1947 Mad. 57 ; *Sankaranarayana* v *Kandaswami*, I.L.R. (1956) Mad. 1300 : (1956) 2 M L.J. 411 : A.I.R. 1956 Mad. 670 ; *A Gopalakrishn. Iyengar* v. *P. Srirangammal*, (1964) 1 M.L.J. 279 : (1964) 1 I.T.J. 451 : 53 I.T.R. (E.D.) 23 : 77 L.W. 61 : A.I.R. 1964 Mad. 364 ; *Shamsher Singh* v. *Rajinder Prashad*, (1973) 2 S.C.C. 524 : 1973 S.C.D. 844 : (1974) 1 S.C.J. 270 : A.I.R. 1973 S.C. 2384.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the Subordinate Judge, Erode, dated 10th August, 1973 and made in Court-fee Check Slip No. 570 in O.S. No. 138 of 1972.

K.P. Sivasubrcmaniam, for Petitioner.

P.S. Srisailam, for Respondents 1, 3 to 8.

K. Venugopal, for Respondents 9 , 10 and 11.

N. Thyagarajan, Additional Government Pleader, for Respondents 12 to 25.

The Court made the following

ORDER.—The plaintiff in O.S. No. 138 of 1972 on the file of the Court of the Subordinate Judge of Erode, who has been called upon to pay additional Court-fee of Rs. 4,499.50 p. has preferred this revision petition to canvass the propriety of the order.

2. With regard to the properties of one Rangaswami Naidu, there was a partition suit in O.S. No. 134 of 1969 to which the members of the family of Rangaswami Naidu were parties. Rangaswami Naidu had two sons of whom one Venkataswami Naidu was the second. In the partition suit, not only Venkataswami Naidu, but his son, the ninth defendant in the present suit were made parties. Ultimately the suit was compromised on 9th July, 1969 and a compromise decree was passed in the said suit under the terms of which, the A schedule properties in the present suit were given to Venkataswami and his minor son, and in addition, the B schedule property herein was given to the minor to be enjoyed by him absolutely. In the present suit, the plaintiff who is the widow of Rangaswami Naidu claims that subse-

quent to the compromise decree she came to know through her son Venkataswami that he had already been married to one Janaki and as such, Venkataswami's marriage with the tenth defendant Krishnaveni who is the mother of the minor ninth defendant was a void marriage. The further case of the plaintiff is that the compromise in the earlier suit proceeded on the assumption that the tenth defendant was the legally wedded wife of Venkataswami and the ninth defendant an off-spring of lawful wedlock, and was therefore entitled to a share in the joint family properties which were sought to be partitioned in O.S. No.134 of 1969. Venkataswami died subsequent to the compromise decree and, has left behind him his wife Krishnaveni the tenth defendant herein, whose valid marriage with Venkataswami is impugned and a minor son and a daughter who are respectively the ninth and the eleventh defendants in the present suit. According to the plaintiff, the ninth and eleventh defendants are only the illegitimate children of Venkataswami and will, therefore have no rights whatever in the A and B schedule properties and are bound to re-deliver those properties in their possession to the plaintiff and the other heirs of Rangaswami Naidu. The prayer in the suit is as follows :

"The plaintiff, therefore, prays that the Court may be pleased to pass a decree:—

(*a*) declaring that the plaintiff is entitled to items 1 and 2 in the B schedule to the plaint and issuing a permanent injunction restraining defendants 9 to 11 from disturbing or interfering with the plaintiff's possession of the same or from collecting the rents for the said items ;

(*b*) directing that the A schedule properties be divided into 18 shares by metes and bounds and ordering delivery of 10 such shares to the plaintiff ;

(*c*) directing items 3 to 6 in B schedule be divided into 9 shares and ordering delivery of one such share to the plaintiff ;

(*d*) ordering defendants 9 to 11 to pay the costs of the suit ;

(*e*) granting the plaintiff such other and further reliefs as may be just and necessary."

3. In accordance with her prayers in the suit, the plaintiff valued the relief of declaration of title and permanent injunction with reference to items 1 and 2 in the B schedule under section 25 (*b*) of the Court-fees Act. As regards partition of one half of the A Schedule properties and possession, she valued the relief under section 37 (1) of the Court-fees Act and paid Court-fee on half of the market value. Lastly, she valued her one-ninth share in the several items of suit properties under section 37 (1) of the Court-fees Act and paid Court-fee thereon.

4. The Court-fee Examiner issued a check slip raising an objection that, since the plaintiff herself was a party to the compromise decree in the earlier suit, she should get the decree cancelled under section 40 of the Court-fees Act before further reliefs of declaration and partition in respect of the properties covered by that decree were sought for. He also raised a query as to whether it would be open to the plaintiff on her own assumption, to treat a valid decree of a Court as not binding without the said decree being cancelled by a competent Court on proved facts. This view was upheld by the learned Subordinate Judge and he called upon the plaintiff to pay the deficit Court-fee of Rs. 4,499.50P.

5. Mr. Sivasubramaniam, learned counsel for the petitioner (plaintiff) vehemently contends that the opinion of the Court-fee Examiner which has found favour with the lower Court is not in accordance with law and that the plaintiff was entitled to ignore the compromise decree and straight—away ask for the reliefs of declaration, partition and possession. According to him, the entire compromise decree is vitiated by the fact that the compromise was entered into on the assumption that the tenth defendant was the legally wedded wife of Venkataswami and that the ninth defendant was his legitimately born son. He would therefore, argue that when it is now found that the basis on which the parties entered into the compromise was misconceived, the plaintiff is entitled to ignore the compromise decree and she

was not bound to ask for the decree being set aside. It is conceded by him that the granting of the reliefs asked for in the present suit may involve the setting at nought of the compromise decree, but his contention is that that cannot alter the state of affairs in any manner.

6. In support of his contention Mr. Sivasubramaniam placed reliance on a large number of authorities which are mentioned below. In *Arunachalam Chetty* v. *Rangaswami Pillai*[1], a Full Bench of this Court held that a suit for a declaration that a mortgage decree was not binding on the plaintiff and for an injunction restraining the defendant from executing the same was a suit for a declaratory decree with a consequential relief within the meaning of section 7 clause (iv) (*c*) of the Court-fees Act (Central Act VII of 1870) and *ad valorem* court-fee on the valuation fixed in the plaint was payable. *Adinarayana* v. *Rattamma*[2], and *Hameed Rowther* v. *Mohideen Pichai*[3] are cases where it was held that where a conveyance deed was alleged to be sham and nominal it was wholly unnecessary for the plaintiff to ask for a cancellation of the deed and pay Court-fee thereon. In *Rambharosa Lal* v. *Bindi Devi*[4], it was held that when a plaintiff wanted to make out a case that he was not a party to a sale deed and the signatures thereon purporting to be those of him were rank forgery, it was not necessary for him to get a consequential relief to have the document cancelled. In *Somasundaram Pillai* v. *Janaki Ammal*[5], it was held that where a suit was brought on behalf of a person described as of unsound mind by his next friend for a declaration that a deed of gift executed by the plaintiff was void and not binding on him and for an injunction to restrain the defendant from interfering with the plaintiff's possession, the plaintiff was entitled to ignore the existence of the document as being void and of no effect. *Abdulla* v. *Subramanyan Pattar*[6], laid down that when a plaint alleged that in a prior suit filed to enforce a mortgage executed by some members of the tarwad the plaintiffs, who were then minors were represented by their guardian and the suit ended in a razinama decree and the guardian had acted *mala fide* and negligently and consequently the decree was fraudulent and collusive, the minors could not be deemed to be parties to the prior decree and the plaint merely involved a declaration as to the decree being a nullity so far as the plaintiffs were concerned and Court-fee was payable under Article 17-A of schedule II of the Court-fees Act. Similarly, Krishnaswami Nayudu, J., held in *Azima Bi* v. *Zohara Bi*[1], that a decree against a minor without representation by a proper guardian is a nullity and in a subsequent suit by the minor for possession, the minor was not bound to have the decree set aside and Cout-fee under section 7 (IV-A) of the Court-fees Act was not payable. In *Akhondala* v. *Damodara*[2], Govinda Menon, J., held that though a minor was *eo nomine* a party to an earlier deed of partition, he was entitled to ignore the deed and file a suit for partition and was not bound to have the earlier partition deed set aside. Reliance was also placed on *Asaram* v. *Ludheshwar*[3], to contend that it is only in the case of a voidable instrument that a cancellation of the deed should be sought for and such a course need not be resorted to in the case of void instruments. As already stated, according to the counsel for the petitioner, the compromise decree was *ab initio* void and did not therefore pose an insuperable obstacle in the way of the plaintiff getting reliefs in her present suit.

7. To buttress his contention that though the earlier suit resulted in a compromise and the compromise was incorporated in a compromise decree, the decree was not an insurmountable obstacle to the plaintiff asking for the reliefs of declaration, partition and possession and the plaintiff was entitled to treat the decree as *non est* and ask for the reliefs, Sivasubramanian

1. (1915) I.L.R. 38 Mad. 922 (F.B): 28 M.L.J. 118 : 28 I.C. 79.
2. (1944) 1 M.L.J. 497 : 57 L.W. 392 : A.I.R. 1944 Mad. 408 (2).
3. (1944) 2 M.L.J. 33 : 216 I.C. 192 : A.I.R. 1948 Mad. 451.
4. A.I.R. 1956 Pat. 203.
5. (1955) 1 M.L.J. 310 : (1955) 68 L.W. 144.
6. (1936) 71 M.L.J. 383 : 43 L.W. 715: A.I.R. 1936 Mad. 470.

1. (1949) 2 M.L.J. 553 : 1949 M.W.N. 681: A.I.R. 1950 Mad. 190.
2. (1952) 2 M.L.J. 145 : A.I.R. 1952 Mad. 810.
3. A.I.R. 1938 Nag. 335.

placed reliance on *Prem Prakash* v. *Mohan Lal*[1], *Bosant Lal* v. *Rameswar Prasad*[2], and *Suk Dev Sahi* v. *Kapil Devi Singh*[3]. These decisions enunciate the rule that where a decree is passed in consequence of a compromise and gives effect to the will of the parties without an adjudication by the Court itself, the contract cannot be said to have any greater sanctity in spite of the fact that the command of a Judge has been added to it. In further support of his argument, the petitioner's counsel also cited *Ram Kishun* v. *Smt. Nere Devi*[4], wherein it was held that when a plaintiff alleged in his subsequent suit that an earlier compromise decree based on a forged compromise petition was wholly void and without jurisdiction, the plaintiff only wanted a finding regarding the void nature of the compromise decree and not a declaration and therefore, he was entitled to pay fixed court-fee under schedule II, Article 17 (6).

8. Yet another decision placed for consideration is *K.H. Md. Ishaque Sahib* v. *H.Md. Saddiq Sahib*[5], where Ganesan, J., held that normally a transaction will bind a person if he or persons under whom he derives title are *eo nomine* parties to the same and must be set aside before any relief is claimed thereunder. But the rule is subject to two exceptions *viz*. (1) where the transaction is only a sham and nominal one; and (2) where the transaction is void in law.

9. Two decisions cited by the Government Pleader, wherein different views have been expressed were sought to be distinguished by the petitioner's counsel. The first of those cases is *Ramanathan* v. *Ramanathan*[6], where a plaintiff who had executed a sale deed for Rs. 6,000 in favour of defendant 1, instituted a suit in the Court of the District Munsif for a declaration that the sale deed was a nominal and sham transaction and defendant 1 had no title to the property. Happell, J., held that as the plaintiff was a party to the sale deed and having regard to the relief asked for by him in the suit, the suit should really contain a prayer for cancellation of the sale deed and Court-fee should therefore be paid under section 7 (*iv*) (a) and the plaint presented in the Court of the Subordinate Judge. This case was sought to be distinguished on the ground that, unlike the present case, the plaintiff therein had asked for a declaration in respect of the impugned document. The second of those cases is *Sankaranarayana* v. *Kandaswamic*[1], where a Full Bench of this Court held that when the plaintiff who had, as a minor, been made *eo nominee* a party to a sale deed or other document of alienation by his mother and guardian, sought to repudiate the transaction, he had to pay Court-fee, under section 7 (*iv*) (a) and pray for cancellation of the sale deed expressly or impliedly. The petitioner's counsel would contend that inasmuch as the transaction was a voidable one and not a void one, the ratio in that case will have no application to the facts of the present case.

10. In my opinion, it is not necessary to deal at length with the cases relied on by the petitioner, as the Court-fee payable by the plaintiff on his suit will have to be decided with reference to the provisions contained in the Tamil Nadu Court-fees and Suits Valuation Act, 1955. Section 40 (1) of the said Act reads as follows :

> " 40 (1)—In a suit for cancellation of a decree for money or other property having a money value or other document which purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest in money, movable or immovable property, fee shall be computed on the value of the subject-matter of the suit, and such value shall be deemed to be—
>
> If the whole decree or other document is sought to be cancelled, the amount or value of the property for which the decree was passed or other document was executed ;
>
> If a part of the decree or other document is sought to be cancelled, such part of the amount or value of the property. "

1. A.I.R. 1943 Lah. 268.
2. A.I.R. 1957 All. 287.
3. A.I.R. 1960 Cal. 597.
4. A.I.R. 1965 Pat. 486.
5. (1970) 1 M.L.J. 207.
6. (1946) 2 M.L.J. 114 : 59 L.W. 411 : A.I.R. 1947 Mad. 57.

1. (1956) 2 M.L.J. 411: I.L.R. (1956) Mad. 1300; A.I.R. 1956 Mad. 670.

From the wording of the section it may be seen that a drastic change has been made in the matter of payment of court-fee in respect of suits where a cancellation of a decree for money or other property having a money value or other document which purports or operates to create, declare, assign, limit or extinguish any right, title or interest in money, movable or immovable property is asked for. Undoubtedly, the compromise decree in O.S.No.134 of 1969 is a document which purports or operates to create, declare and assign the right, title and interest of parties in the properties involved in the said suit. It therefore goes without saying that unless that compromise decree is set aside, the plaintiff will not be entitled to ask for the reliefs of declaration, partition and possession. The operative effect of section 40 was considered by Jagadisan, J., in *A. Gopalakrishna Iyengar* v. *P. Srirangammal and another*[1]. That was a case where a son filed a suit for recovery of possession of properties and rendition of accounts from his mother who claimed to have a life estate in respect of the suit properties under an earlier partition. There also, a contention was raised that the document of partition was void and need not therefore be set aside as a void document was *non est* in law. Repelling this contention Jagadisan, J., held that inasmuch as the document of partition purported to create certain rights, it fell within the ambit of section 40 and would therefore necessitate a cancellation of the deed being asked for by the plaintiff before ever he could ask for other reliefs. The learned Judge pointed out the change that had been introduced in the law and stated that the question for consideration was not whether the partition deed was void or voidable but only whether it would fall within the ambit of section 40. In like manner it must be held in the instant case that the question for determination is not whether the compromise decree is a void or voidable instrument, but whether it fell within the ambit of section 40. The plea of the petitioner's counsel that the petitioner had only asked for the reliefs of declaration, partition and possession and had nowhere prayed in the plaint for a cancellation of the compromise decree, cannot advance the situation in any manner for the petitioner. As laid down in *Shamsher Singh* v. *Rajender Prasad*[1], the Court, in deciding the question of Court-fee has to look into the allegations in the plaint to see what is the substantive relief that was asked for and mere astuteness in drafting the plaint cannot be allowed to stand in the way of the Court looking into the substance of the relief asked for. In that case a Hindu son filed a suit against his father and a mortgage decree-holder for a declaration that the mortgage executed by the father in respect of the joint family property was null and void for want of legal necessity and consideration. The Court held that though the relief asked for was couched in a declaratory form, the suit was in substance; (1) either for setting aside the decree or (2) for declaration with a consequential relief of injunction restraining the decree-holder from executing the decree against the mortgaged property. I am clearly of opinion that these two cases will govern the situation and the petitioner cannot escape her obligation to pay court-fee as called for by the lower Court.

11. From another point of view also, the petitioner must be held liable to pay Court-fee required for setting aside the compromise decree. It may be recalled that the decree in the earlier suit was not one rendered by the Court on merits, but was one rendered on a compromise entered into by the parties. The compromise decree entered into by the parties may well partake the characteristics and incidents of a family arrangement. In this view, even if the petitioner's contention of the ninth and eleventh defendants being illegitimate children of deceased Venkataswami Naidu is to be accepted, the compromise arrived at in the earlier suit may have been the result of a family arrangement between all the parties concerned. There is no bar in law to the members of a joint family including the illegitimate son of one of the coparceners to the benefit

1. (1964) 1 M.L.J. 279 : (1964) 1 I.T.J. 451: 53 I.T.R. (E.D.) 23 : 77 L.W. 61 : A.I.R. 1964 Mad. 364.

1. (1973) 2 S.C.C. 524 : (1974) 1 S.C.J. 270: 1973 S.C.D. 844 : A.I.R. 1973 S.C. 2384.

of partition and as such, there can be no bar to the ninth defendant having been given properties in the compromise arrived at in the earlier suit. If this postition is taken note of, it necessarily follows that the plaintiff must have the compromise decree set aside before ever she can ask for the reliefs of declaration, partition and possession. In that view of the matter also, the petitioner must fail.

12. In the result, the revision petition is found to be devoid of substance and therefore will stand dismissed. But there will be no order as to costs.

R.S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*T. Ramaprasada Rao* and *S. Ratnavel Pandian, JJ.*

Thanumalayaperumal Mudaliar and others .. *Appellants**

v.

The Commissioner, The Hindu Religious and Charitable Endowments (Administration) Department, Madras and others

.. *Respondents.*

Temple—Suit for declaration—Whether private or public—Characterstics of private temple—Grant of two acres of land by stranger—Whether alters the character of endowment—Presence of worshippers on certain occasions—Not conclusive that public had ingress.

The inspection report of the Commissioner (Hindu Religious and Charitable Endowment) which was to the effect that there was no gopuram, no dwajasthan' ham, no procession of the utsava idols, no hundi, no vahanam and no bell, cumulatively taken, give the impression that the temple is a private one. [*Para.* 10.]

The fact that at one particular point of time a small extent of two acres odd was additionally granted to the deity by some strangers cannot alter the nature of the initial grant or the character of the institution from a private one to a public one. [*Para.* 12.]

No independent witness or member of the public had come to say that he was visiting the temple as of right and perfoming the poojas pursuant thereto. The mere presence of the worshippers on certain occasions by itself is not conclusive to show that the generality of the public were having ingress into the temple as of right. [*Para.* 13.]

Cases referred to:—

Sri Chidambareswara Sivagami Ambigai Temple v. *The Commissioner of H.R. & C.E., Madras*(1966) 1 M.L.J. 109:78 L.W. 404: I.L.R. (1965) 2 Mad. 404: A.I.R. 1966 Mad. 99: *Mundancheri Koman* v. *Achuthan Nair and others,* 67 M.L.J. 788 : 61 I.A. 405 : I.L.R. 58 Mad. 91 : A.I.R. 1934 P.C. 230; *Babu Bhagwan Din* v. *Gir Har Saroop and others,* (1940) 1 M.L.J. 1 : 51 L.W. 4 : 67 I.A. 1: A.I.R. 1940 P.C. 7; *Ramaswami Naidu* v. *Commissioner of H.R. & C.E., Madras,* (1974) 87 L.W. 595; *Commissioner of H.R. & C.E.* v. *Jagannatha Rao,* (1974) 87 L.W. 675 ; *Ramaswami Jadaya Gounder* v. *Commissioner, H.R. & C.E.* (1963) 2 M.L.J. 280: 76 L.W. 611: A.I.R. 1964 Mad. 317 ; *Goswami Shri Mahalaksmi Vahuji* v. *Rannchhoddass Kalidas,*(1970) 2 S.C.R. 275 : A.I.R. 1970 S.C. 2025 : *T. Gopalan* v. *Commissioner, H.R. & C.E, Madras,* (1973) 1 S.C.J. 169 : (1973) 1 M.L.J. (S.C.) 43: (1973) 1 An.W.R. (S.C.) 43: (1973) 1 S.C.R. 584: A.I.R. 1972 S.C. 1716; *Chennammal* v. *Commissioner, H.R. & C.E.,* (1973) 2 M.L.J. 442; *Kuppi Sanjevi Reddi and others* v. *Commissioner, H.R. & C.E., Madras* (A.S. 405 of 1969) ; *Tilkayat Shri Govindlalji Maharaj* v. *The State of Rajasthan,* (1964) 1 S.C.R. 561 : (1064) 2 S.C.J. 715 : A.I.R. 1963 S.C. 1638.

Appeal against the decree of the Court of the Subordinate Judge of Nagercoil dated the 15th day of March, 1969 and passed in O.S. No. 7 of 1966.

S. Padmanabhan, for Appellants.

The Additional Government Pleader, for 1st Respondent.

T.R. Ramachandran, K. Chandramouli, T.R. Rajagopalan and *N. Subramaniam,* for to 8 Respondents.

*Appeal No. 787 of 1969. *28th February,* 1975.

The Judgment of the Court was delivered by

Ramaprasada Rao, J.—The unsuccessful plaintiffs in O.S. No. 7 of 1966 on the file of the Subordinate Judge, Nagercoil appeal against the judgment and decree of the learned Judge, who did not agree that the suit temple was a private one, but in whose opinion it was a public temple. The relevant pleadings may be summarised. (2) Periaveettu Mudaliars about 1000 years ago founded two Siva temples one at Azhakiapandiapuram and the other at Aloor. The temple at Azhakiapandiapuram is known as Ambalathaduvar temple and the Aloor temple is popularly known as Chera Chola Pandia Mahadevar temple. They were built on the sites belonging to the ancestors of the plaintiffs and were constructed with their private funds. There is no evidence expressly as to dedication but from time immemorial these temples were recognised as the private temples of the Periaveettu Mudaliar family. It is claimed that the inscription in the Aloor temple, which is the subject matter of this litigation, bears ample proof as to the private nature of the temple. Reliance is also placed on a printed book Exhibit A-22 written by Tamil Vidwan Chidambara Kuttalam Pillai under the caption of "மூவரசர் ஊரென்னும் ஆளூர் தெய்வவிருயகர் மகிமை." Contemporary records but which are ancient, are also relied upon to show that the suit temple was built with private funds and was treated as such by the rulers of Travancore. Exhibit A-4 of the year 1896 is an order issued in the name of the Dewan. The proceedings obviously were initiated when a complaint was received about its mismanagement by the then trustees. The point however is that on the undertaking given by the then trustees to maintain the accounts and look after the temple affairs properly the complaint was dismissed ; but there is a recognition about the status of the temple as a private temple in this document. Long afterwards under Exhibit A-12 and in the year 1962 the Palace Officer of the Travancore Devaswom refers to the quondam grants given to this temple as a private temple but makes it clear that on and after the date of issue of Ex. A-12 such grants for all private temples including the suit Aloor temple were discontinued. Exhibit A-5 is a copy of the settlement register in Aloor Pakuthy showing that many of the suit properties stood in the name of the then trustees but for the benefit of the deities installed in the temple. There is no dispute that the temple was built on private land. Exhibit A-6 is also incidentally pressed into service which shows that three strangers also provided properties to the temple, but incidentally recognised that it was a private temple. The temple was never dedicated to the public and the members of the public did not have access to the temple and worship the deity therein as a matter of right nor did they claim any such right in a legally conceivable manner. The plaintiffs themselves referred to a suit filed by the second plaintiff as O.S.No. 22 of 1962 on the file of the same Court for a declaration that the temple was a private one. Without going into the merits, but on the question whether the suit was maintainable the Court held against the second plaintiff in that suit, as the enquiry relating to the nature of an institution has to be decided by the statutory tribunal under the provisions the Tamil Nadu Religious and Charitable Endowments Act, 1959. It is also claimed that an application was filed under the appropriate section before the appropriate authority contending that the suit temple in question was not a religious institution and that the plaintiffs held Office hereditarily.

The Deputy Commissioner Hindu Religious and Charitable Endowments Department Madurai, held the hereditary trusteeship right in favour of the plaintiffs, but held that the temple was a public religious institution. Thereafter, the further appeal by the plaintiffs to the Commissioner was dismissed and hence they had to file the present suit under section 70 of Tamil Nadu Act XXII of 1959.

3. The Hindu Religious and Charitable Endowments Department represented by its Commissioner, who is the first defendant in the suit, contends that the temples mentioned in the plaint were not founded by the ancestors, that the members of the Hindu public have been freely offering worship on almost all the days, that they contributed towards the maintenance

and sustenance of the institution and that it has all the characteristics of public temples. Reliance is placed upon the judgment in O. S. No. 22 of 1962 on the file of the same court wherein a casual finding to the effect that the institution was a public religious institution was given and that, therefore, it is not open to the plaintiffs to reagitate the issue once again. The donations given by the strangers as evidenced by Exhibit A-5 are very strongly pressed into service to show the public character of the suit temple, that at best the plaintiffs were only managing the temples and they were not proprietors thereof and that the public were visiting the temple as of right. According to the Department there were deities inside the temple and the features of the temple such as availability of utsavavigrahams, existence of inner and outer prakarams, vimanams, outer madil, three entrances and balipeetam, are all indicia that go to prove that the institution is a public religious institution. It is to be noticed that the Endowments Department was the only defendant when the plaintiffs came to Court. Later defendants 2 to 8 got themselves impleaded and filed a written statement. They would say that the temple and its premises are in sarcar poramboke and that ever since its inception the suit temple has been a public temple where the Hindu public have been freely offering worship without let or hindrance. The temple has been consecrated for the benefit of the Hindu public and at no time the plaintiffs' ancestors, and for a greater reason the plaintiffs, did exercise any right of proprietorship over the temple. It is said that the Rulers of State and the members of the public mainly contributed the properties now annexed to the temple and that the mode of construction and the other features already referred to by the first defendant would negative the plea that the institution is a private temple. On these contentions the following issues and additional issues were framed :

" 1. Whether the temple and its properties constitute a private family trust as alleged by the plaintiffs or a public trust as contended by the defendant ?

2. Whether the right of management of the temple and the trust rests solely with the plaintiffs ?

3. Whether Madras Hindu Religious and Charitable Endowment Act, 1959 will govern the administration of the trust ?

4. Whether the order of the Commissioner is liable to be set aside on the grounds stated in paragraph 7 of the plaint ?

5. Whether the temple is a private temple ?

6. Whether the plaintiffs are entitled to the declaration prayed for in the plaint ?

7. To what reliefs are the plaintiffs entitled ?

8. What is the order as to costs ?

9. Whether the plaintiffs are estopped from contending that the suit temple and its properties belong to the private family of the plaintiffs ?

10. Whether the suit is barred by *res judicata* in view of the findings in O.S.No.22 of 1962 of the sub-Court, Nagercoil ? ".

Mr. Padmanabhan, learned counsel for the plaintiffs reiterated the arguments and took us through the oral and documentary evidence let in this case to sustain his contention that the temple is a private temple. Mr. T.R. Ramachandran for the respondent contending *contra* would sustain the judgment of the Court below on the ground that the plaintiffs did not produce the account books maintained by them to show that at all material times the ancestors of the plaintiffs and thereafter the plaintiffs, owned the temple. Reliance is placed upon the endowment by strangers and the features of the Aloor temple and it is said that the overall impression one gains from the evidence on record is to the effect that there was at no time a private temple at the site which belonged to the plaintiffs' ancestors. The learned counsel would rely upon one singular feature in the case. A copper plate said to contain the history of the

temple and referred to in one of the pamphlets produced by the plaintiffs themselves (Exhibit A-22) not having been produced, it is said, that there is a suppression of material and, therefore, the suit has to be dismissed.

4. The question whether an institution or a temple is a public religious institution or a public temple or a private one has been the subject-matter of many decisions of this Court and that of the Supreme Court and it is easy, therefore, at this stage to deduce from them the well-set norms, guidelines and principles on which a decision, one way or the other could be rendered on the principal issue in question.

5. In the State of Travancore, there were a number of temples under private management and there were other temples in which the Sarcar had been exercising the right of supervision in exercise of its sovereign power. It was always possible for the Sarcar or the Government under the then regulations in force which were to provide for the better administration of Hindu Religious Endowments in Travancore to assume management of the same in case of mismanagement.

6. A Bench of our High Court in *Sri Chidambareswara Sivagami Ambigai Temple* v. *The Commissioner of H. R. and C. E., Madras*[1], recognised the existence of private temples in Travancore and would not invoke the usual presumption that in the case of temples in South India, they are public unless the person, who asserts it is private, discharges the onus of proof which is on him to the satisfaction of the judicial authority. They observed :

> " It is now well-settled that unlike, the temples in Kerala, there is a presumption that temples in South India are public and the onus of proof is on the person asserting it to prove that it is a private temple."

We have referred to this judgment only to show that in Kerala under the regulations concerning religious endowments then in force, there were many private temples in the State of Travancore as it then was and that the State recognised such private ownership of religious institutions.

7. "The temple" as defined in Tamil Nadu Act XXII of 1959 in section 6 clause 20 means a place by whatever designation known, used as a place of public religious worship, and dedicated to, or for the benefit of, or used as of right by, the Hindu community or any section thereof as a place of public religious worship. The three guidelines which enable Courts to decide whether a particular religious institution comes within the scope of the meaning of the above definition are that it should be a place of public worship, there should be acceptable proof of dedication for the benefit of the Hindu community or a section thereof and incidentally it should also be established that the worshippers have been using as of right the religious institution as a place of public religious worship. In so far as temples in Malabar are concerned, the presumption was that a temple was a private temple, *Mundancheri Koman* v. *Achuthan Nair and others*[1], reiterated in *Babu Bhagwan Din and others* v. *Gir Har Saroop and others* [2].

8. The other inspiring norms to decide whether a temple is a private or public temple is dependent upon the features o the institution. They could be conveniently summarised with reference to decided cases:

> (*a*) The existence of Moolasthanam, "Mahamandapam, Prakaram, idols of chief and other deities, utsavamurthis, daily poojas, special poojas and procession during festive occasions, worship by the local public belonging to different communities without any let or hindrance, are all factors which give the impression that the temple is a public one ".

Vide *Ramaswamy Naidu* v. *Commissioner H.R. & C.E., Madras*[3]:

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1. (1966) 1 M.L.J. 109 : 78 L.W. 404 : I.L.R. (1965) 2 Mad. 404 : A.I.R. 1966 Mad. 99.

1. 67 M.L.J. 788 : 61 I.A. 405 : I.L.R. 58 Mad. 91 : A.I.R. 1934 P.C. 230.
2. (1940) 1 M.L.J. 1 : 67 I.A. 1 : 51 L.W. 4 : A.I.R. 1940 P.C. 7.
3. (1974) 87 L.W. 575.

(*b*) If the temple is being used as a "place of public religious worship, if there is no dedication of the temple to and for the benefit of the Hindu community or any section thereof, if it is not used generally by the Hindu community as of right as a place of public religious worship, if there is no hundial and no collections are made from the public for the peformance of any festival connected with the temple as for its maintenance and no member of the public has come forward to say that he has contributed any amount for the maintenance or any of the related poojas to the deity therein, the temple will not be a public temple, but a private one ".

Vide *Commissioner, H.R. & C.E.* v. *Jagannatha Rao*[1] and *Ramaswami Jadaya Gounder* v. *Commissioner, H.R. & C.E.*[2]

(*c*) The origin of the temple, the "manner in which its affairs are managed, the nature and extent of the gifts received by it, rights exercised by devotees in regard to worship therein, the consciousness of the manager and the consciousness of the devotees themselves as to the public character of the temple, are factors that go to establish whether a temple is a public or a private one and in each case both the documentary and oral evidence have to be considered as is whole while keeping in view the above principles."

Vide *Goswami Shri Mahalaxmi Vahuji* v. *Ranchhoddas Kalidas*[3] and *T. Gopalan* v. *Commissioner, H.R. & C.E., Madras*[4].

(*d*) "An inference whether a religious institution is a public one or a private one can be drawn from the usage and customs of the institution or from the mode in which the properties have been dealt with as also the other established circumstances."

Vide *State of Bihar* v. *Biseshwar Das*[5] :

" (*e*) The essential *sine qua non* to make a temple a public temple appears to be that the public should claim the right to worship the deity installed therein as of right. If the origion of the temple is very well-known as a private temple, then the clearest possible evidence is necessary for converting that temple into a public temple. As worshippers, are naturally welcome and as the sentiment of a Hindu would not prevent another from making offerings or to turn away a worshipper and as there is an innate desire in persons in charge of private temples not to discourage popularity of the deity, the mere circumstance that the people in the locality were visiting the temple and were worshipping the deity may not take away the character of the temple from a private temple to a public temple. In all such cases worship of outsiders is referrable to the leave and licence granted by the owner and cannot be indicative of any dedication to the public."

1. (1974) 87 L.W. 675.
2. (1963) 2 M.L.J. 280: 76 L.W. 611: A.I.R. 1964 Mad. 317.
3. (1970) 2 S.C.R. 275: A.I.R. 1970 S.C. 2025.
4. (1973) 1 S.C.J. 169: (1973) 1 M.L.J. (S.C.) 43: (1943) 1 An.W.R. (S.C.) 43: (1973) 1 S.C.R. 584: A.I.R. 1972 S.C. 1716.
5. (1971) 3 S.C.R. 680: A.I.R. 1971 S.C. 2057.

Vide *Chennamal* v. *Commissioner, H. R. & C. E.*[1] :

" (*f*) A temple will not be a public temple within the scope of the Act because in the absence of an express dedication for the benefit of the public, user by the public as of right must be established and such user as of right is far different from the trustees being willing to welcome the public to come and worship in the temple. If a temple had no garbagraham, mahamandapam and if there was no dwajasthambam, no prakaram, no hundi and if no kanikai or any collection was made by the temple and if the utsava idols were not taken in procession in the street then the temple is not a public one."

Vide *Kuppi Sanjeevi Reddi and others* v. *Commissioner, H. R. & C. E., Madras*[2].

" (*g*) If the public do not worship the idol as of right and simply because some poojas are performed in a temple and certain members of the public are allowed to participate in the pooja, the temple cannot be said to be a public temple."

1. (1973) 2 M.L.J. 442.
2. A.S. No. 405 of 1969.

Vide A.S. No. 409 of 1971 and C.M.P. No. 822 of 1975.

9. In the light of the above principles, the oral and documentary evidence has to be considered in the instant case. No doubt, there is no evidence as to express dedication, but by long user and the custom prevailing in Malabar and by virtue of the regulations that governed such temples in Kerala, it cannot be lightly said that the suit temple is a public one. The inscription in Exhibit A-1 coupled with the treatment of the temple by the Sarcar or the Government or the State of Travancore or by the Rulers of Travancore as seen from Exhibit A-4 and Exhibit A-12 give also the same impression. That the properties of the temple were dedicated by Periaveettu Mudaliar family is clear from the pattas produced. Reliance, however, is placed on certain donations made by strangers which were annexed as properties of the temple. Such sporadic donations by strangers would not militate against the original characteristic of the temple which sprung from private bounty and endowments made by private individuals. The one factor, which was very greatly pressed into service by Mr. Ramachandran, is that the copper plate referred to in Exhibit A-22 has not been produced. It is by now well established that dedication to a temple could be proved by direct evidence or by acceptable indirect evidence. There is ample indirect evidence in this case to show that for several centuries, this temple was the private property of the Periaveettu Mudaliar family. Exhibit A-8 is a partition deed between the family members. One branch of the members of the family, who decided to remain in Aloor, obtained the right to own, manage and administer the temple in Aloor (Chera Chola Pandia Mahadevar temple, Aloor) and they got the property as well as the temple allotted to them and to their share in the said partition deed. This is an ancient document. There is nothing said against it. The force of it should not be lightly ignored. We have again a very important document in the nature of a Commissioner's report. which has been marked as Exhibit A-26 in this case. The inspection of the temple was made by the Commissioner in the presence of the Inspector of the Hindu Religious and Charitable Endowments Department. He noted the inscription evidenced by Exhibit A-1. He inferred from it that Ashtabandhana Prathish'a ceremony was made and the inscription also speaks to the fact of the consecration of the image of Sivakami Amman adjacent to the Murthi of Lord Nataraja. There are only open varandahas on all four sides and there are various idols like Lord Vigneswara, Lord Sastha, Nagaraja and Bhoothathan and Lord Krishna. To some idols no roofing is provided for. There is also the image of Lord Chandikeswarar. There is no gopuram for the temple. There is neither the permanent flag staff (dwajasthambham) nor is there even a structure for installing a temporary flag staff for celebrating periodical utsavams of the temple. There is nothing to indicate that such a ceremony was performed in that temple at all. No provision has been made for taking out the idols of the temple on procession to any place outside the inner compound of the temple. There is no hundi for collection from the worshippers of the temple. There is no bell and when the Commissioner visited the temple, there was deepaaradhana and there were no outsiders excepting himself and the two Inspectors of the Department. The provision of the door and compound wall and the site of the temple is such that it is incapable of attracting members of the public to resort thereto as of right either for worship or for participating in any celebration therein. The cocoanut grove near the temple belongs to the temple.

10. The inspection report of the Commissioner, which is to the effect that there is no gopuram, no dwajasthambham, no procession of the utasava idols, no hundi, no vahanam and no bell, cumulatively taken, give the impression that the temple is a private one. The non-production of the copper plate may be for reasons beyond the control of the plaintiff. One could expect that if there was a copper plate at all, as mentioned in Exhibit A-22, it ought to have been there in 1786, which is the year which the inscription Exhibit A-1 bears. Due to lapse of time, the copper plate might

have been misplaced and none has given any specific evidence about this. But on this slender accident which does not outweigh the abundant documentary evidence already referred to, we are unable to accept the contention of Mr. T. R. Ramachandran, that the temple is a public one.

11. Before considering the oral evidence, it is necessary to make a comment. D. Ws. 2 to 8 got themselves impleaded as parties to the action on their own request. The purpose of such an attempt to become parties to the litigation is obvious. The first witness examined on the side of the defendants is a resident of Azhkiapandiapuram and not Aloor. He is a relation of the plaintiffs and he is a veteran litigant. He has filed as many as 10 suits and the trend of his examination shows that everything was not well with him in so far as the plaintiffs were concerned. He claimed the amount payable by the Government to the Aloor Temple and was unsuccessful. He has been, therefore, brought to Court by the defendants so as to conveniently speak against the plaintiffs. He refers to the fact that the members of the general public were not prevented by the plaintiffs or any of their ancestors in the matter of worshipping of the deity inside the temple. Excepting for his bare statement that the public were worshipping as a matter of right, there is nothing in his evidence to substantiate the same. D. W. 2 is a manager of Deputy Commissioner's office, Hindu Religious and Charitable Endowments Department. He admits that there is no gopuram in the temple, but there is only a vimanam. He says that many Hindus attended the temple during poojas and were worshipping, that the worshippers were coming as of right and that they were given prasadam. He would say that there were no vahanams in the suit temple and that there was no procession of the deities in the street. There is no structure even for mounting dwajasthambam or the other idols according to the witness, as no utasavam is performed. He admits that there are no hundials. He would refer to Mr. Bhaskara Pillai and three villagers as having been present at the time when dheeparadanai was made on the date when the Commissioner went to inspect the temple. It is significant that neither this Bhaskara Pillai nor any other member of the public has been examined to show that the public ever visited the temple as of right. D. W. 2 is one of the defendants. He refers to the endowments by strangers and admits that after the plaintiffs became the managers, the public are not allowed to take part in the functions of the temple. He would say hesitantly that there would be cheevili function daily and there would be beat of drums. He is a person, who is having definitely grievance against the plaintiffs. Exhibit A-4 is a complaint written by him and others against the mismanagement of the temple affairs. He is again a witness, who has been deliberately brought in by the defendants to sponsor their cause. We have already referred to the fact that defendants 2 to 8 were impleaded as parties. Excepting for one defendant, who has chosen to go into the box and who was also inimically disposed towards the plaintiffs and their management, no other independent witness was examined on the side of the defendants. If really the public were interested in maintaining for themselves that they visited the temple as of right and worshipped the deity in exercise of such right, nothing prevented the defendants from examining independent witnesses. We have no hesitation in rejecting the evidence of D. Ws. 1 and 3 as interested testimony and as persons who had an axe to grind and who were not favourably disposed towards the plaintiffs and their ancestors.

12. In *Tilkayat Shri Govindlalji Maharaj* v. *The State of Rajasthan and others*[1], the Supreme Court held that grants posterior to the initial grants would not affect the nature of the initial grants made to the temple. There is unimpeachable evidence in this case that all the properties standing in the name of the deities were provided with funds of the Periaveettu Mudaliar community. The fact that at one particular point of time a small extent of two acres odd was additionally granted to the

1. (1964) 2 S.C.J. 715: (1964) 1 S.C.R. 561: A.I.R. 1963 S.C. 1638.

deity by some strangers cannot alter the nature of the initial grant or the character of the institution from a private one to a public one. The plaintiffs in paragraph 5 of the plaint state that all the properties mentioned in the schedule excepting an extent of two acres 57 cents are the properties purchased by the funds belonging to their family and endowed for the temple at different times by the ancestors of their family. The first defendant in the written statement would simply deny this allegation and would aver that contributions have been made by the members of the public and even the rulers of the State for the temple, its upkeep and performance of ceremonies. Besides stating this, nobody spoke to it or proved the allegation. In the written statement of defendants 2 to 8 again there is a bare allegation that the temple has not been constructed by the plaintiffs' ancestors nor was any property endowed in the name of the temple. D. W. 3 would only refer to the donation made by some strangers which bears a very small proportion to the totality of the properties owned by the suit temple. No sasanam has been produced no deed of dedication has been marked and we are yet to know the circumstances under which the strangers dedicated such properties. No nexus has been established between the so-called endowments and the properties of the temple. The answer to this specific allegation in the plaint is vague. We are unable therefore to accept the contention of the learned counsel for the respondent that by reason of the supervening endowments made by strangers the temple ought not to be treated as a private temple.

13. In the beginning we have set out the principles which have to be borne in mind in deciding whether a temple is a private one or a public one. At the outset we have to mention that the indicia and the necessary features which ought to be present in a temple are absent in the instant case. Utsavamurthis are not taken in procession. There is no gopuram. There is proof of Ashtabandhana Prathishta having been made by the ancestors. There is no external indicia which is ordinarily present in public temples in South India. The compound wall is not to be equated to a prakaram. There were no worshippers at the time when the deeparadhana was done. Excepting the representative of the Commissioner and the two Inspectors, there is no proof that any member of the public participated in it. D.Ws. 1 and 3, who readily responded to the call of the defendants, were inimically disposed towards the plaintiffs. No independent witness or member of the public has come to say that he was visiting the temple as of right and performing the poojas pursuant thereto. The mere presence of the worshippers on certain occasions by itself is not conclusive to show that the generality of the public were having ingress into the temple as of right. Though there is no express dedication the passage of time and the course of conduct of the members of the family have clearly established that it was the Periaveettu Mudaliar of Aloor with private funds who conscreated the idols and built the temple and its surroundings and endowed properties in the name of the deity. The defendants wanted to fish information by asking the plaintiffs to produce account books relating to the temple. If a person alleges that a particular religious institution is a public temple, it is for him to establish it. The plaintiffs allege that it is a private temple and that they have fairly established by reasonable oral and documentary evidence that it is such an institution. The defendants have failed to discharge the onus of proof. When they wanted the plaintiffs to produce the account books, they were fishing for information, as they were not armed with material to discharge the burden of proof, which is on them. Having regard to the essential principles which should govern the facts while rendering a decision whether a religious institution or a temple is a public or a private one, we are not satisfied that in the instant case the defendants have produced such clinching and acceptable material which should prompt us to hold that the temple is a public one. The learned Subordinate Judge, who was not veryclear in the treatment of the materials, came to a different conclusion. But after analysing the evidence both oral and documentary, we are unable to agree with the decision of the learned Subordinate Judge.

14. The appeal is, therefore, allowed with costs.

S.J. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :— *P. S. Kailasam and C. J. R. Paul, JJ.*

Onthan ... *Appellant**

(A) Evidence Act (I of 1872), section 32(1)—Dying declaration—Evidentiary value—Corroboration—Necessity.

(B) Dying declaration—Person belonging to political party—Political party having no faith in God—Evidentiary value of the dying declaration.

A dying declaration can be accepted without corroboration and all that is necessary for the Court is to satisfy itself whether the statement is true and if it is convinced that the statement is true, it is the duty of the Court to convict. [*Para.* 16.]

The fact that the person giving the dying declaration belonged to a political party which had no faith in the existence of God would not make any difference in assessing the truth or otherwise of the dying declaration. [*Para.* 16.]

It may be that the party may not believe in God, but there may be persons belonging to the party who may have faith in God. [*Para.* 16.]

Cases Referred to :—

Pompiah v. *State of Mysore*, (1965) 2 S.C.J. 157:(1965) M.L.J. (Crl.) 510: A.I.R. 1965 S.C. 939; *Khusal Rao* v. *State of Bombay*, 1958 S.C.J. 198 : 1958 S.C.R. 552 : (1958) M.L.J. (Crl.) 100 : A.I.R. 1958 S.C. 22; *Guruswami*, In re, I.L.R. (1940) Mad. 158 : (1940) 1 M.L.J. 124 : A.I.R. 1940 Mad. 196.

Appeal against the Judgment of the Sessions Judge of the Court of Session of the East Thanjavur Division at Nagapattinam in S.C. No. 2 of 1974, dated 1st August, 1974.

G. Gopalaswami and *S. Ravindran*, for Appellant.

The Public Prosecutor No. III, for State.

* Crl. A. No. 656 of 1974.

23rd April, 1975.

The Judgment of the Court was delivered by

Kailasam, J.—The first accused in Sessions Case No. 22 of 1974 on the file of the Sessions Judge, East Thanjavur, who was found guilty of an offence punishable under section 302 of the Indian Penal Code, and sentenced to imprisonment for life, is the appellant before us.

2. Before the learned Sessions Judge, fourteen accused were charged for various offences, the main charge being against accused 1 to 3 for an offence under section 302, Indian Penal Code, for committing the murder of one Baluswami, the first accused stabbing him with a sulukki and the second and the third accused cutting him with aruvals, at about 3 P.M. on 9th October, 1973 at Palavanakudi Village. There were other charges against the accused persons under sections 147, 148, 323, 324, 325 and 435 read with section 149, Indian Penal Code. The several accused were also charged individually for injuries caused to the various prosecution witnesses. As all the accused have been acquitted of all the charges, except the first accused who has been convicted of the offence under section 302, Indian Penal Code, as stated above, we refrain from referring to the details of the other charges framed against the several accused.

3. The accused's party as well as the prosecution party were residents of Palavankaudi Village in Nagapattinam taluk. All of them originally belonged to Dravida Kazhagam, but the prosecution party became members of the Right Communist party in 1968. Consequently, there were keen rivalry and misunderstandings between the two groups. Security proceedings were initiated against the accused's party and the prosecution party. The proceedings ended in discharge of both parties, but still the enmity persisted.

4. On 9th October, 1973, at about 3 P.M. P.W. 11 Jagannathan, an agricultural labourer belonging to the Right Communist Party, was proceeding from his house for work in the fields. While he was passing the house of the 9th accused in Kochakudi road, two women by name Valliammal and Alamelu who belonged

to the Dravida Kazhagam made disparaging remarks against the witness and abused him for having come to the area where the members of the Dravida Kazhagam were residing. P.W. 11 also abused in return. At that time, P.Ws. 1, 12 and accused 4 and 9 and one Thiagarajan who came there effected a mediation and P.W. 11 was sent away. When P.W. 11 was returning home along the river-bund, he saw Baluswami (deceased in this case) and P.W. 2 Thangavelu coming from the east to the west near Kochakudi road junction. P.W. 11 told the deceased Baluswami as to what had happened near the house of the 9th accused. P.W. 1 had also joined them. While they were talking there, the accused who belonged to the Dravida Kazhagam, pelted stones at them. In retaliation, the prosecution witnesses and Baluswami hurled brick bats. The accused then marched towards the prosecution witnesses and there was a scuffle, in which, according to the prosecution witnesses, the 1st accused was armed with a sulukki and accused 2 and 3 were armed with aruvals, accused 7 and 11 were armed with bala and alakku aruval respectively and the other accused were armed with sticks except the 4th accused who was unarmed. The accused advanced towards the place where prosecution witnesses were. There was pelting of stones by either side. The first accused, who was coming in front, pushed Baluswami in the paddy field of Subbia Pillai. Baluswami fell down in the field. Immediately, accused 1 to 3 jumped into the field and the second accused cut Baluswami on the left shoulder with aruval, while the third accused cut him on the right forearm with aruval. The first accused, in his turn, stabbed Baluswami on the right side of his chest with sulukki. While the first accused withdrew the sulukki, the iron portion of it got embedded in Baluswami's chest and the stick portion alone came out.

5. As regards the attack on Baluswami (the deceased) P.Ws. 1 to 12 were put up as eye-witnesses, and they gave details of the occurrence and ascribed specific parts to the various accused in causing injuries to Baluswami and the prosecution witnesses.

6. After the attack on Baluswami and after the crowd had left, Baluswami walked towards the mandapam. He was helped by P.W. 10 Muniammal to reach the western side of the house of P.W. 16 Ladan. Baluswami and the other injured witnesses were taken to the Government Hospital, Tiruvarur, in a cart. At 5-30 P.M. the same day, P.W. 18, Dr. Sheela Robert attached to the Government Hospital, Tiruvarur, examined Baluswami and found on him three injuries which are described in Exhibit P-7 the wound certificate given to him. On the same day, the doctor examined the injured persons, P.Ws. 2, 3, 4, 5, 6, 7, 8 and 9 and accused 4, 5, 13 and 14 and gave them all wound certificates.

7. The doctor, P.W. 18 sent a message through P.W. 23 to the Sub-Inspector of Police, P.W. 25. P.W. 25 reached the hospital at 6-30 P.M. and he recorded a dying declaration, Exhibit P-26, from Baluswami. The doctor certified that the patient was conscious when Exhibit P-26 was recorded. P.W. 25 also recorded a statement (Exhibit P-33) from the fifth accused at the hospital. Baluswami was sent to the Headquarters Hospital, Nagapattinam for further treatment. He was taken in an ambulance to the Nagapattinam Hospital. P.W. 19, the Civil Assistant Surgeon attached to the Headquarters Hospital, Nagapattinam admitted Baluswami the same day as an in-patient. P.W. 20 the District Medical Officer, conducted operation on Baluswami and removed from his chest M.O. 1, the iron portion of the sulukki. Baluswami died in the hospital at 12-10 A.M. on 10th October, 1973. The news of the death of Baluswami was communicated to the police, who altered the crime into one under section 302, Indian Penal Code, and sent express reports and commenced investigation.

8. P.W. 21, the doctor attached to the Headquarters Hospital, Nagapattinam, conducted autopsy on the dead body of Baluswami at 1 P.M. on 10th October, 1973 and found on the dead body three injuries. Injury No. 3, on dissection, was found to have pierced the underlying pleura and, according to the postmortem certificate (Exhibit P-30) and the evidence of the doctor, was necessarily fatal.

9. The prosecution relies on the testimony of P.Ws. 1 to 12 and the two dying declarations given by Baluswami, one to the doctor (P.W. 18) as per Exhibit P-8 and the other (Exhibit P-26) given to the Police Officer (P.W. 25).

10. The learned Judge was not prepared to accept the testimony of P.Ws. 1 to 12 regarding the existence of an unlawful assembly. He found that the prosecution had not proved that the common object of the unlawful assembly was to cause the death of Baluswami. He found that both sides had indulged in a free fight. As a result, he found that the offences under sections 147 and 148 had not been made out against the several accused. As already stated, the learned Judge acquitted the several accused of specific charges of causing injuries to the prosecution witnesses, for, according to the learned Judge, considering the nature of the injuries caused to both sides in the course of the free fight between the two groups, the accused cannot be held liable for the various charges regarding the injuries caused to the witnesses. The learned Public Prosecutor also did not press some charges as there was no sufficient evidence to substantiate them.

11. The main charge, the learned judge concerned himself, was the charge under section 302, Indian Penal Code, against accused 1 to 3. Regarding the second and the third accused, the learned Judge gave them the benefit of doubt as Baluswami had not mentioned about the parts played by those two accused in the attack against him, in the very first dying declaration, Exhibit P-8, given by him. The learned judge found that so far as Exhibit P-8 is concerned, there is no reason for not accepting it and, relying on that as well as the testimony of P.Ws. 1 to 12, the eye-witnesses, regarding the injury inflicted by the first accused on Baluswami, he found that the case of the prosecution that it was the first accused who caused the fatal injury to deceased Baluswami, could be safely accepted.

12. Mr. G. Gopalaswami, learned counsel for the appellant submitted that the learned Judge having not accepted the testimony of the eye-witnesses, he was in error in placing, reliance on the two dying declarations, Exhibits P-8 and P-26. He submitted that the dying declarations, by themselves could not be acted upon as there is material discrepancy between the two dying declarations, as the second dying declaration has attributed specific parts to accused 2 and 3 regarding the attack on the deceased and has mentioned the presence of four persons who have not been mentioned in the earlier dying declaration, Exhibit P-8. According to the learned counsel, the second dying declaration which was recorded by the police cannot be safely acted upon and, in any event, as Baluswami had shown a tendency to implicate more persons in his second dying declaration, that dying declaration cannot be accepted as containing a true account of the incident so far as the participation of the first accused is concerned.

13. As the contention of the learned counsel is about our accepting the two dying declarations, we would refer to them in some detail. The doctor, P.W. 18, before whom Baluswami was produced at 5-30 P.M. examined him and issued the wound certificate. The doctor found the condition of the patient serious and sent information to the Sub-Magistrate for recording a dying declaration. As the Sub-Magistrate was not available, the doctor proceeded to record the dying declaration of Baluswami as narrated by him. She read over the contents of the statement to Baluswami and he accepted the same to be correct and then signed it in her presence. She has certified that the patient was conscious when he made the said statement.

14. The only challenge in cross-examination of this witness regarding Exhibit P-8 is that when she recorded Exhibit P-8, Baluswami and the other injured persons were together. In Exhibit P-8, Baluswami had stated that he ploughed his lands ; he did not know about the dispute in the village; he was pushed into the field: Accuseds 1, 7, 4, 12, 6, 10, 11, 3 and 9 were near him and accused 1 stabbed him; beyond that he did not know anything. The learned counsel does not dispute the fact that the deceased made the dying declaration in a conscious state and it was recorded by the doctor, P.W. 18. He contends that the statement in

Exhibit P-8 cannot be accepted as the truth. In order to question the credibility of Exhibit P-8, he referred to the second dying declaration, Exhibit P-26, which was recorded at 7 P.M. by P.W. 25, the Sub-Inspector of Police. In this dying declaration, Baluswami had stated that on 9th October, 1973 he ploughed his land and came near the house of the 9th accused; accused 1 to 12 were there armed with aruvals, sulukki, bamboo sticks etc; and the first accused pushed him down, the second accused cut him on the left shoulder, the third accused cut him with an aruval on the right hand and the first accused stabbed him with sulukki on the chest, and that the iron portion of the sulukki got embedded in his chest. He swooned and later recovered at Tiruvarur hospital. He learnt that P.Ws. 2, 3, 5 and 9 were attacked with aruvals and sticks by persons belonging to Dravida Kazhagam. He further stated that the occurrence took place in a field near the house of the 9th accused, at about 3 P.M. The learned counsel pointed out that in Exhibit P-26, the presence of accused 2, 5, 8 and 12 was mentioned for the first time and specific parts were attributed to accused 2 and 3 regarding the attack on the deceased, namely that the second accused cut on the left shoulder and the third accused cut with an aruval on the right hand. It was submitted that in the interval between the recording of Exhibit P-8 and the recording of Exhibit P-26 Baluswami was in the midst of his party-men and they induced him to falsely ascribe parts to the second and the third accused and implicate four more accused. As Baluswami had proved himself to be amenable to influence and willing to falsely implicate other persons the learned counsel submitted that no reliance can be placed on either of the two dying declarations, Exhibits P-8 and P-26. We are unable to accept the contention of the learned counsel that Baluswami was influenced by his party men to falsely implicate and ascribe parts to the second and the third accused. Baluswami was in a very bad state and could have been suffering from excruciating pain. The iron part of the sulukki was left embedded in his chest and what would have been foremost in his mind was to mention the person who inflicted that injury which had left the sulukki in his chest. He had mentioned to the doctor, P.W. 18, that it was the first accused that stabbed him with sulukki. It may be that when he gave Exhibit P-26 he was in a slightly better state to account for the other injuries which were less serious, by mentioning the persons who caused those injuries. It may be that because, at the earliest point of time, the parts played by the second and the third accused were not mentioned, they will be entitled to the benefit of doubt, but that does not mean that the statement of Baluswami that the first accused stabbed him is not true. The learned Judge has found that the main core of the case, namely, that it was the first accused that caused the fatal injury is found mentioned in both the dying declarations, Exhibits P-8 and P-26, and there can be no doubt in accepting the part played by the first accused. So far as accused 2 and 3 are concerned, the learned Judge gave them the benefit of doubt as the parts played by them were not mentioned in the earlier dying declaration.

15. We are not persuaded to accept the other grounds relied on by the learned counsel for discrediting the two dying declarations. Soon after the incident, Baluswami gave the statement in which he ascribed the specific overt act to the first accused. The plea that Baluswami belonged to a political party which was inimically disposed against the accused's party or that the members of his party were present to tutor him, does not appeal to us, for, it is not disputed that Baluswami would have had the opportunity of seeing his assailant. He was fit enough to give a dying declaration. So far as the injury on the chest is concerned, he would have known his assailant and there is no reason at all for him to omit the real assailant and falsely implicate the first accused. As he had himself known the assailant, we fail to see how the presence of the other persons belonging to his party would make any difference.

16. It was next submitted that much weight cannot be given to the dying declaration of a person who did not have much regard for truth. In this connection, learned counsel suggested that Baluswami belonged to a political party

which had no faith in the existence of God. We do not think that the fact that a person belonged to the Communist Party would make any difference in assessing the truth or otherwise of the dying declaration. We are not prepared to accept the general suggestion that that party, as a whole, does not believe in the existence of God. It may be that the Party may not believe in God, but there may be persons belonging to the Party who may have faith in God. It is accepted that even in Russia there are churches where persons are at liberty to go and pray. A nonbeliever can be a votary of truth whereas a believer may not be. We therefore decline to be influenced by the suggestion that Baluswami belonged to a Party which has no faith in God. The learned counsel also relied on the decision of the Supreme Court reported in *Pompiah* v. *State of Mysore*[1], which reiterated the view expressed by it in *Khusal Rao* v. *State of Bombay*[2], and submitted that, as the dying declaration cannot be subjected to close scrutiny as it is made in the absence of the accused who had no opportunity to cross-examine the deponent, it should not be accepted without corroboration. This Court, in In re, *Guruswami*[3], has laid down that a dying declaration can be accepted without corroboration and all that is necessary for the Court is to satisfy itself whether the statement is true and, if it is convinced that the statement is true, it is the duty of the Court to convict. The position as stated by the Supreme Court in *Khusal Rao* v. *State of Bombay*[2] it as follows :

> "In order to pass the test of reliability, a dying declaration has to be subject to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of the statement by cross-examination. But, once the Court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the death and the assailants of the victim, there is no question of further corroboration. If, on the other hand, after examining the dying declaration, in all its aspects, and testing its veracity, the Court has come to the conclusion that it is not reliable by itself and that it suffers from an infirmity, then, without corroboration, it cannot form the basis of a conviction."

17. We have already pointed out that we have no reason for not accepting the testimony of the dying declaration, Exhibit P-8. Though we do not reject Exhibit P-26 as false, we feel that the names of the second and the third accused are not mentioned in Exhibit P-8 and for that reason they are entitled to the benefit of doubt. In other words, we accept the truth of both the dying declarations, but we base our conclusion only on Exhibit P-8 which was earlier and hold that the persons not mentioned therein are entitled to the benefit of doubt. We accept the dying declaration, Exhibit P-8, and the testimony of the prosecution witnesses who say that it was the first accused that caused the fatal injury to Baluswami. The learned Judge, while declining to accept the testimony of P.Ws. 1 to 12 regarding the presence of an unlawful assembly with the common object of causing the death of Baluswami, found that it was safe to accept their testimony regarding the injury that was caused by the first accused to the deceased. We accept the reasoning of the learned Judge. We accept the testimony of P.Ws. 1 to 3, 5 to 8 and 10 to 12 (P.W. 4 has turned hostile to the prosecution and P.W. 9 has not attributed the fatal injury to the first accused). The learned counsel pointed out that so far as the specific injuries on the prosecution witnesses were concerned, the learned Judge was not prepared to accept the testimony of the prosecution witnesses and the same rule should be applied regarding the injury caused by the first accused to the deceased. We are unable to accept the contention, for, the learned Judge does not reject the testimony of P.Ws. 1 to 12 regarding the injuries caused to the prosecution witnesses, but he refrains from convicting the accused on the ground that because the injuries were caused in a free fight between

1. (1965) M.L.J. (Crl.) 510 : (1965) 2 S.C.J. 157: A.I.R. 1965 S.C. 939.
2. (1958) M.L.J. (Crl.) 100: 1958 S.C.J. 198: 1958 S.C.R. 552 : A.I.R. 1958 S.C. 22.
3. (1940) 1 M.L.J. 124 : I.L.R. (1940) Mad. 158 : A.I.R. 1940 Mad. 196.

the two parties, the accused cannot be held liable for the various charges regarding the injuries caused to the prosecution witnesses. Apart from this reason, it is seen that so far as the injury caused to the deceased by the first accused is concerned, the truth or otherwise of the testimony of the prosecution witnesses is guaranteed by the said fact being found mentioned in Exhibit P-8 and Exhibit P-26. We agree with the conclusion of the learned Judge and hold that the prosecution has satisfactorily proved that it was the first accused that caused the fatal injury to the deceased Baluswami and that the conviction of the first accused for the offence under section 302, Indian Penal Code, and the sentence of imprisonment for life imposed on him for the said conviction are correct, and they are confirmed and the appeal is dismissed.

V.S. *Sentence confirmed;* ——— *appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*T. Ramaprasada Rao and S. Natarajan, JJ.*

T. Durairajan .. *Appellant**

v.

Sri Kasi Viswanathaswamy temple (Tawker's Charities) represented by trustees for the time being Sri T. R. Ramanatha Davey and T. R. Viswanatha Davey at No. 36, Ekambareswarar Agraharam, Park Town, Madras-3 .. *Respondent.*

Land Acquisition Act (I of 1894), sections 30, 31 and 32—Temple lands—Lease for erecting buildings—Possession delivered—Buildings not put up—Acquisition by the Government—Public purpose—Compensation to the temple—Apportionment—How to be made.

A lessee pure and simple has certain defined rights and they are also normally reflected in the deed of lease entered into between the parties. But if a lease imposed certain conditions for the effectuation of the lease and there are in the instruments, covenants, obligations and stipulations undertaken by the lessee as well as the landlord, the Court is bound to take into consideration the impact of such obligations and the stipulations on the net value of the lessee's interest or landlord's interest. Thus in evaluating the tenant's interest in the property as lessee's interest, the various recitals in the deed have to be looked into and each of those obligations will have to be subjectively at least valued to arrive objectively, at the net compensation to be awarded to such a tenant or landlord. In the process, a fair approach has to be made and the resultant figure equitably calculated. The working should not present a case of unfairness or perversity. A reduction in quantum in compensation based on mere speculation ought not to be made.

[*Para.* 9.]

When the lands are acquired in which tenants claim certain rights the marketvalue of the property has to be ascertained and thereafter the interest of the tenant has to be evaluated and then the balance has to be paid over to the landlord. The broad principles of evaluation have to be adjusted on equitable considerations after noticing the problem which might arise in each of the cases. The interest which may be varied and different of the various parties interested in the lands has to be evaluated with reasonable precision and the compensation equitably distributed amongst them. The fundamental *sine qua non* before apportionment is that every conceivable interest in the land of the various persons before Court has to be noticed before an ultimate analytical recording of such compensation and the formula of distribution is found.

Held : that the compensation amount is to be apportioned between the landlord and the tenant in the ratio of 4/5th and 1/5th. [*Paras.* 13, 19 *and* 20.]

Cases referred to:—

Shama Prosunno Bose Mozumdar v. *Bragoda Sundari Dasi*, I.L.R. 28 Cal. 146 ; *Dinendra Narain Roy* v. *Tituram Mukerjee*, I.L.R. 30 Cal. 801 ; *Sadasheorao Krishna Rao Buti* v. *Collector, Nagpur*, A.I.R. 1942 Nag. 86; *Collector of Dacca* v. *Gholam Kuddus Chodhury*, A.I.R. 1936 Cal. 688 ; *V. Ponniah*

*Appeal No. 650 of 1967 and Memo of Cross Objections.

6th *December*, 1973.

Nadan v. *T.N. Deivanai Ammal*, 36 M.L.J. 463 : 9 L.W. 453 : 52 I.C. 247 : 26 M.L.T. 311 ; *Thirulakshmi Ammal* v. *Special Tahsildar for Land Acquisition*, (1973) 2 M.L.J. 317: 86 L.W. 613 : A.I.R. 1974 Mad. 182 ; *The Raja of Pittapuram* v. *The Revenue Divisional Officer, Cocanada*, I.L.R. 42 Mad. 644 : 36 M.L.J. 455 : 51 I.C. 656 ; *Rubby Joint Water Board* v. *Shaw Fox*, (1972) 2 W.L.R. 757 ; *Dossibai N. Jeejeepsoy* v. *Pestonji M. Bharucha*, 60 Bom.L.R. 1208: I.L.R. 1959 Bom., 370; *Bait Saraswathi Jeshankar* v. *Bharatkhand Textile Manufacturing Company Ltd.*, A.I.R. 1967 Guj. 36.

Appeal against the decree of the City Civil Court (IVth Asst. Judge) Madras dated 18th March, 1967 and made in L.A.C. No. 39 of 1964.

T.R. Ramachandran and *R. Srinivasan*, for Appellant.

M.S. Venkatarama Iyer and *G. Rangaswamy Iyengar*, for Respondent.

The Judgment of the Court was delivered by

Ramaprasada Rao, J.—The second claimant in a reference made to the City Civil Court, Madras under sections 30 and 31 (2) of the Land Acquisition Act is the appellant. On 24th April, 1963 a notification under section 4 (1) of the Land Acquisition Act was issued by the State Government to acquire an extent of about 140 grounds comprised in Survey Nos. 25/3 and 25/4 of Chinna Chembarambakkam and T.S. No. 1/2 of Ayanavaram for the public purpose of construction of a terminal station and depot for the Madras State Transport Department. The land belonged to Sri Kasi Viswanathaswami Temple administered by a body of trustees compendiously known as Tawker's Charities. The present appellant claims to be a lessee in respect of those lands. The Land Acquisition Officer, after due enquiry, fixed the market value of the acquired lands at Rs. 8,18,041.03 and on appeal to the civil Court it was enhanced to Rs. 9,04,769.81. But, as the Land Acquisition Officer could not determine the quantity and quality of rights in the property and thereafter in the compensation awarded *inter se* as between Tawker's Charities as the first claimant and the present appellant as the second claimant, he had to, as there was no agreement between the claimants regarding the proportion in which the compensation has to be apportioned as between them within the meaning of section 29 of the Land Acquisition Act, refer the dispute under section 30 to the Civil Court for a determination and settlement of the said dispute and for the ultimate ascertainment of the compensation payable to each, if both of them are entitled to it. It is in that context the reference was made to the trial Court. The trial Court apportioned the compensation in the proportion of one-fifth in the total compensation including the interest payable thereunder upto January, 1967 to the second claimant and directed that the first claimant would be entitled to the balance of four-fifths of the compensa- and the interest payable therein which amount was directed to be invested in approved securities since the first claimant was a charitable and religious institution. The second claimant is aggrieved by the manner in which the trial Court apportioned the compensation as between himself and the Trust and hence the appeal. In order to contend that the second claimant was not entitled to any portion of the compensation amount and that the apportionment of 1/5th of the compensation amount in his favour is wrong and erroneous, the first claimant has preferred the memorandum of cross-objections. The relevant facts may now be stated.

2. As early as 1912, a scheme was made by the High Court, Madras, for the proper administration of the Trust known as Tawker's Charities, which was both religious and secular. On an application taken out by the Advocate-General of Madras and the Hindu Religious Endowments Board, the scheme was modified by an order of this Court dated 24th September, 1937 whereunder the present Trustees were appointed as Trustees of the Tawker's Charities and they were directed to perform the obligations as contained in the scheme. In order to improve the income of the Trust the Trustees applied, in June, 1959 for laying out the properties which are the subject-matter of acquisition and applied in lay-out Application No. 94 of 1959 to the Corporation of Madras for a division of the land for purposes of laying it out as building sites.

But this application for lay-out was returned to the Trustees for certain modifications as is seen from the letter to the Corporation of Madras dated 30th June, 1959. The Trustees did not pursue this matter thereafter, but took out an application in the High Court for sanction to lease out these lands on certain terms and conditions proposed by them. This Court invited offers to find out whether the sale of the properties and reinvestment of the sale proceeds thereof would be more beneficial to the Trust. Finding that the offers received from intending purchasers were not attractive, the Court expressed the view that the terms suggested by the Charities to lease out the properties were more beneficial to the Trust and therefore sanctioned the proposal of the Trustees to lease out the properties on terms and conditions suggested by them. This order was made by the High Court in Application No. 767 of 1960 on 1st July, 1960. Prior to the first claimant making such an offer, it obviously made discreet and private enquiries to find out the best method by which the property could be leased out. There were certain initial negotiations between the first claimant and the second claimant in which certain definite terms as to the proposed lease by Court. In fact, the second claimant while approving of the terms and stipulations under which he was prepared to take a lease of the properties, tendered a sum of Rs. 5,000 as earnest money to show his readiness and willingness to take properies on lease and which the Trustees could keep till the Court sanctioned the lease. After the Court approved of the terms and conditions of lease suggested by the first claimant and agreed to by the second claimant, the claimants entered into a lease deed Exhibit B-1 on 12th October, 1960 recording their agreement in due form and bringing out the lease deed into operation. We may at once refer to the terms and conditions of the said lease deed Exhibit B-1 which was also renewed under Exhibit B-2.

3. Under Exhibit B-1 150 grounds of land belonging to the first claimant were leased out to the second claimant for a period of thirty years in the first instance with an option to the lessee for renewal of the least for a further period of thirty years for the purpose of erecting buildings thereon. The second claimant was to pay to the first claimant a rent of Rs. 5 per ground per month for the first thirty years and Rs. 7-50 per ground per month for the subsequent period of thirty years. It was also agreed that as the demised property was intended to be developed by the lessee, the land required and covered by roads and pathways and not occupied by building shall be left out of account for the purpose of computing the area for levying the rent. The maximum percentage of the property which could be so left out for purpose of development, such as roads, etc., was fixed at 25 per cent. of the total areas. In case it was found that the area so set apart for roads and development exceeds 25 per cent. then a stipulation in favour of the lessee was alternatively provided for. Clause 5 of the lease deed says that the second claimant shall at his own cost prepare the necessary plans for a lay out of the area and submit the same to the Corporation of Madras and obtain its sanction for laying out the property for construction of buildings without unnecessary delay ; all charges towards laying of the roads, drainage, electricity, etc., to be incurred or payable to the Corporation authorities or otherwise relating to the above property in respect thereof shall be borne by the lessee. The sum of Rs. 5,000 tendered by the lessee even during the initial negotiations was treated as permanent deposit for the due fulfilment of the obligations under the lease. Clause 7 expressly stated that at least in ten of the plots in the demised property, buildings shall be caused to be erected within a period of one year from the date of sanction of the lay out by the Corporation of Madras, and if within the period of one year the building in at least ten of the plots are not constructed as aforesaid, the first claimant shall be at liberty to demand payment of two years rent to be paid within one month of the date of notice, failing such payment the first claimant was at liberty to determine the lease and the second claimant shall forfeit the deposit of Rs. 5,000. The second claimant was at liberty to sub-lease the property or portion of the demised

land. The second claimant took on the obligation to pay all taxes, rates and assessments in respect of both the developed plots or of the structures and buildings to be raised thereon excepting the quit rent (Urban Land Tax) payble to the Government. At the end of sixty years the first claimant reserved for itself the right to purchase the superstructures on the land at the then market value. If the first claimant makes a default, then the second claimant had the option to continue for a further period of thirty years on same terms and conditions as contained in the deed. But the rate of rent, however, was altered to Rs. 9 per ground per month. There were other normal clauses with which we are not concerned in the present enquiry. The lessee exercised his option to secure the lease for a further period of thirty years and under Exhibit B-2 the agreement between the first and the second claimants regarding such renewal for a further period of thirty years was recorded and registered. The net result is that the second claimant secured a right as lessee over the properties acquired for a period of sixty years from 12th October, 1960.

4. The second claimant soon after the sanction of the lease by the High Court began to correspond with the Town Planning Section of the Corporation of Madras and sought for permission to divide the lands as building sites by laying out the same in accordance with law. He made this application in August, 1960, long before Exhibit B-1 was registered. Though his layout application was registered and given a number, it could not be taken up for consideration by the Corporation as the necessary formalities were not complied with. On 11th November, 1960 the second claimant was informed that he should pay a sum of Rs. 730 towards centage charges for the intended layout for purposes of scrutiny of plans, survey work of the layout area and preparation of estimates. The second claimant paid, the centage charges on 7th December, 1960. The Corporation, by its letter dated 7th February, 1961, informed the second claimant the nature of the amenities which should be provided for in the layout area, and also the list of conditions subject to which the layout application would be placed before the Standing Committee for sanction. They called for a definite reply from the second claimant and specifically informed him that a sum of Rs. 70,985 was to be paid by him as improvement charges. It was made, clear that the layout application would be proceeded with only an payment of the estimated improvement charges demanded as also the express consent of the second claimant—regarding the proposals made by the Corporation in its letter dated 7th Feburary, 1961. Except to state in his reply dated 2nd September, 1961, that he would write further on the demands made by the Corporation in their letter dated 7th February, 1961 the second claimant did not pursue the matter any further and there the matter stopped. It may be of interest to note that the second claimant obtained possession of the lands only on 5th March, 1961.

5. Both the claimants appeared before the Land Acquisition Officer and placed their respective views in relation to their entitlement to the compensation to be awarded by him as a result of the acquisition of the land which obviously terminated the leasehold interest of the second claimant. As the dispute could not be adjusted as between the claimant, the compensation amount was deposited in the Civil court under sections 30 and 31 (2) of the Land Acquisition Act. The Court on enquiry gave the findings resulting in the award of one fifth of the compensation to the second claimant and the balance to the first claimant. Hence the appeal.

6. The arguments addressed before the trial Court were repeated before us. Mr. T. R. Ramachandran, learned counsel for the second claimant, hesitantly contended that as the first claimant as a charitable institution has no powers of alienation in respect of the property in question ,the entire compensation amount has to be invested and the same is not liable to be apportioned as between the first and the second claimants and that from and out of the income by such investment the second claimant is bound to pay the agreed rent as per the lease deeds Exhibits B-1 and B-2 till the expiry

of the period of sixty years and it is only thereafter the first claimant would be entitled to the compensation amount. This argument is based on section 32 of the Land Acquisition Act. Though the learned counsel did not vehemently press this argument, it has become necessary for us to consider the import of the language of section 32. The bone of contention of the parties in this litigation is as to what interest each of the claimants has towards the compenstion awarded for the lands which were admittedly subject to a lease before the notification under section 4 (1) was made. Section 32 is an enabling section prompting the Court to invest moneys belonging to an institution or a person who has no power to alienate the acquired lands for the purchase of other lands to be held under the like title and conditions of ownership as the land in respect of which such money shall have been deposited was held. No doubt the first claimant did not under the common and statute law have the power to alienate the lands. But under certain circumstances the Court can intervene, in its extraordinary jurisdiction, and direct them to alienate the lands if in its opinion a fair price is securable by such a process and that such an alienation is for the betterment of the institution or the person. The sole criterion which is the foundation for a Court to order alienation of inalienable property or properties having such a badge of inalienability is the benefit for the institution, the necessity thereof and the interests of the institution as a whole. In that sense the language in section 32 (1) "any peron who had no power to alienate the same" had to be understood and applied. The mandate in section 32 to the Court to direct investment of the compensation awarded is in a case where the Court finds as a fact that the person had no power at all and at all times to alienate the same. If there is however a sanction of a competent Court which enables the administrative body of an institution or a person to sell or alienate the same, then the mandate therein has to be understood to be so limited. The discussion therefore leads to the *prima facie* but reasonable conclusion that the prescription in section 32 ought not to be applied in accordance with the facts and circumstances of each case. This conclusion can also be arrived at by comparing the language of section 31 with that of section 32. Section 31 (1) refers to the obligation on the part of the Collector or the Land Acquisition Officer to tender payment of the compensation awarded to the persons interested and entitled thereto according to the award. Section 31 (2) thereafter says that if such persons interested shall not consent to receive it, or if there be no person competent to alienate the land........ the Collector shall deposit the amount of the compensation in the Court to which a reference under section 18 would be submitted. Section 32, no doubt, uses the expression "any person who had no power to alienate the same". This has to be read in conjunction with section 31 (1) and to the limitations already pointed out. In the instant case, it cannot be said that the mandate in section 32 has to be literally applied and the vague contention of the second claimant accepted. As would be seen presently, the alternative contention of the second claimant that he should also be deemed and considered as a person interested in the land has some force. The problem therefore resolves itself into this: What is the nature of interest which the second claimant had in the property acquired and what is the quantity and quality of such interest of the second claimant in the compensation awarded by the Court and which compensation has come to Court by reason of the reference made by the Collector under section 31 of the Land Acquisition Act. We are therefore not impressed with the extreme contention of the second claimant that the entire compensation has to be invested and he is entitled to enjoy the income therefrom subject to his only liability to pay the rent as agreed to under the lease deeds.

7. This leads on to the question which revolves round the primary contention of Mr. T.R. Ramachandran as to what is the nature, quality and quantity of interest of the second claimant in the lands acquired. It is the contention of the learned counsel that the second claimant not only performed but was ready and willing to perform all his obligations under the lease deed and consequent

upon such readiness and willingness on his part to abide by the conditions and stipulations of the lease deed he would be entitled to such share in the compensation awarded, which according to him, should not in any event be less than 50 percent of the total compensation. On the other hand, Mr. M.S. Venkatrama Iyer, learned counsel for the first claimant, would contend that as the second claimant did not hold out that he was ready and willing to undertake such responsibilities, the second claimant cannot be deemed to be a person having any interest in the lands. In the alternative it is said that if he has any such interest it should be evaluated in accordance with the accredited principles relatable to the situation. Mr. M.S. Venkatrama Iyer seriously urged that the only way to solve the problem and allocate the compensation, if its allocatable at all as between the claimants, is to evaluate the share of the second claimant on the foot that he had a leasehold interest in the acquired lands on the appropriate date and after quantifying and reckoning the said amount, pay the entire balance to the first claimant as the sole person entitled to it in law and which corpus has to be administered by the Trust in the manner provided for under the scheme sanctioned and approved by the High Court. Lastly it was brought to our notice that the second claimant has created a Trust called Temple Charities Trust, which is a public charitable Trust, under an instrument of Trust dated 27th February, 1970. The purpose of the Trust appears to be to honour and perpetuate the memory of late Sri V.V. Srinivasa Iyengar, Advocate, Madras. We are satisfied that the second claimant along with three others who have constituted themselves as the Board of Trustees for the Temple Charities Trust, are the persons in present interested in the compensation to which the second claimant would be entitled to, and for these reasons the petitions C.M.P. Nos. 13096 and 13097 of 1972 to implead the Temple Charities Trust represented by its Trustees as parties are allowed.

8. At this stage certain general observations are necessary before we consider the respective contentions of parties as to what compensation they are entitled to in lieu of their subsisting interest in the acquired property.

9. The science of evaluation of rights of affected and interested parties, under the Land Acquisition Act evades precise analysis. Neither a mathematical exactitude nor a preceise computation of values is possible, as in the nature of things a certain amount of guess work enters into it. The methodology becomes even more difficult if the related case concerns itself with the reckoning of the value of the landlord's right as against tenant's rights in the land acquired, on the date of the notification under section 4 (1) of the Act. Whilst under section 23 of the Act the value of the land together with its inhered potential can also be evaluated, when we come to apportionment of the compensation as between the tenant and the landlord, myriad concepts have to be borne in mind so as to reasonably assess the reversionary value of the land as against the possessory right of the tenant under the various but agreed terms of lease. A lessee pure and simple has certain defined rights and they are also normally reflected in the deed of lease entered into between the parties. But if a lease imposed certain conditions for the effectuation of the lease and there are in the instrument covenants, obligations and stipulations undertaken by the lessee as well as the landlord, the Court is bound to take into consideration the impact of such obligations and stipulations on the net value of the lessee's interest or landlord's interest. Thus in evaluating the tenant's interest in the property as lessee's interest, the various recitals in the deed have to be looked into and each of those objections has to be subjectively at least valued to arrive objectively at the net compensation to be awarded to such a tenant or landlord. In the process, a fair approach has to be made and the resultant figure equitably calcualted. The working should not present a case of unfairness or perversity. A reduction in the quantum of compensation based on mere speculation ought not to be made. Every possible but actual deduction has to be made from the gross compensation payable either to the landlord or the tenant. One other important aspect has also to be borne in mind while dealing

with cases involving computation of lessee's interest over properties. The mere nomenclature adopted by the parties creating certain rights known to law may not by itself be a safe guide for a mechanical adoption of the same for purposes of evaluating the rights created thereunder. Parties may call an instrument a lease deed. By that it should not be assumed as a matter of course that the lessee's interest under that instrument has to be evaluated without any further look or probe into the other covenants or obligations in that deed which makes an inroad into such rights and which also creates certain obligations on the part of the lessee, which if considered in their true light would have equally an impact on the total value of the leasehold interest. Each case therefore has to be considered in accordance with the facts and circumstances arising thereunder and the quality of rights of parties ascertained and ultimately such rights so ascertained be quantified in accordance with the well known principles of evaluation.

10. Mr. M. S. Venkatarama Iyer contended that the second claimant, in fact, had with him the necessary hypothesis in the matter of submission of a lay-out plan to the Corporation of Madras. The first claimant, no doubt, in June, 1959, under Exhibits A-2 and A-7, attempted to lay out their lands by submitting plans in connection thereto to the Corporation of Madras. But when they were asked to widen the road and they were confronted with certain suggestions in the matter of improvement of the land by the Corporation, they would not take any further steps. The order of the Court on 1st July, 1960, which enabled the first claimant to lease out the properties subject to certain conditions and stipulations to the lessee perhaps prompted the Charities not to pursue the matter further with the Corporation. But what is sought to be made out by Mr. M. S. Venkatarama Iyer is that even at the stage of negotiation of the lease, the second claimant approached the Corporation for a lay-out and when he was specifically asked by the Corporation of Madras to deposit a sum of Rs. 70,985 in its letter dated 7th February, 1961 and thereafter resubmit the revised plans, the second claimant would only state that he had demarcated the sites and streets and that the other works such as road works, sewering work, lighting work, etc., have to be carried out and that he would write to the Corporation further in the matter. This information was conveyed by the second claimant to the Assistant Engineer, Town Planning, Corporation of Madras, on 2nd September, 1961. Thereafter, admittedly, the second claimant did not pursue the matter. Mr. M. S. Venkatarama Iyer, relying upon sections 215 and 216 of the Madras City Municipal Corporation Act, would state that the second claimant did not take any concrete steps in the matter of improving the lands as undertaken by him under the lease deed. He would also refer to clauses 5 and 7 of the lease deed which obligates the second claimant to lay out the property for construction of buildings without unnecessary delay and put up buildings at lease on ten plots within one year from the date of sanction of the lay-out by the Corporation of Madras. Inas much as the second claimant did not take any steps for obtaining sanction of the lay-out or for depositing the estimated improvement charges as called for by the Corporation, the case of the first claimant is that such a non-performance of the conditions for the sustenance of the lease would automatically terminate the leasehold interest. Strong reliance was placed upon section 31 of the Transfer of Property Act which reads as under :

> "Subject to the provisions of section 12, on a transfer of property an interest therein may be created with the condition superadded that it shall cease to exist in case a specified uncertain event shall happen, or in case a specified uncertain event shall not happen."

Countering this argument Mr. T. R. Ramachandran would state that the second claimant was taking all reasonable steps at material times to perform his part of the contract and as possession was handed over to the second claimant only on 5th March, 1961 he was making efforts to comply with the requirements as called for by the Corporation, but ere long the proposal of the

Government to acquire the lands came in October, 1972. It is common ground that in the middle of 1962 the proposal of Government to acquire these very lands was made known and it was followed by a notification under section 4 (1) on 24th April, 1963 followed up by the Government taking possession of the lands on 7th November, 1963 pursuant to the acquisition process. Further it was contended that there is no express condition in the lease deed wherein the leasehold interest shall cease on the happening of any event or the non-performance of any condition mentioned therein. On the other hand clause 7 provides that if within the period of one year, buildings in at least ten of the plots are not constructed as aforesaid, the first claimant shall be at liberty to demand payment of two years' rent to be paid within one month of the date of the notice, failing such payment the first claimant would be at liberty to determine the lease and the second claimant would forfeit the deposit of Rs. 5,000. It is not the case of the first claimant that any such notice was given and there was a consequential failure on the part of the second claimant to pay the payable rent which the first claimant could demand in case of default. One other factor which is ancillary to the above contention was brought to our notice by Mr. T. R. Ramachandran. He would state that the first claimant accepted the agreed rent—without demur till 31st December, 1964 and that by itself reflects the intention of the parties that the non-construction of ten buildings within one year from the date of sanction is not a permordial condition, a default in which would create a cessation of interest of the second claimant in the land. It was therefore said that section 31 of the Transfer of Property Act is applicable to the facts and circumstances of this case.

11. It is common ground that rent was received by the first claimant till 31st December, 1964, that is, beyond the period when the notification under section 4 (1) was made. It cannot be said with precision that the parties intended at the time when they entered into the lease deed to effect a cessation of the lease on the second claimant not performing his obligations as reflected in clauses 5 and 7 of the lease deed. In order to attract section 31 of the Transfer of Property Act the defeasance clause should be one which is certain and which the parties intended to enforce. The cessation of interest in immovable property on the happening of an event is in the nature of a penalty and Courts are expected to grant relief against such penalties if a strict compliance as intended is not done resulting in the forfeiture of the right. In the instant case clause 7 of Exhibit B-1 itself provides intrinsic evidence that cessation was not behind the minds of parties when the lease was entered into. But on the other hand if buildings as agreed to are not put up within a period of one year from the date of sanction of the lay-out, the second claimant is expected to pay two years' rent when demanded. The first claimant did not exercise this option. It is only on failure of the second claimant to pay the penal rent on demand, a determination of the lease is contemplated. Before the forfeiture clause could operate there is another condition which the parties voluntarily stipulated as a step in said towards such a cessation of interest. It is not claimed that the first claimant so demanded the two years' rent and that there was a failure on the part of the second claimant in the matter of such payment of rent demanded. Therefore, we are unable to agree with Mr. M. S. Venkatarama Iyer that there is an automatic cessation of the interest of the second claimant in the demised property by reason of his failure to put up buildings within the time stipulated.

12. The next contention of the counsel on either side based on the alternative relief to which either of them would be entitled, thus gains prominence in the instant case. We may at the outset reiterate our earlier dissent on the extreme contention of Mr. T. R. Ramachandran that the interest of the second claimant should be deemed to be a permanent interest and that therefore the entire compensation should be invested and the second claimant be entitled to the income therefrom subject only to the liability to pay the agreed rent to the Charities. In the various decisions cited

by Mr. T. R. Ramachandran, which concern themselves with permanent leases or statutory tenants, compensation has been fixed by Courts in varied proportions ranging from one-third to the tenant and two-thirds to the landlord or three-fifths to the tenant and two-fifths to the landlord, ten annas to the tenant and six annas to the landlord, etc., In *Shama Prosunno Bose Mozumdar* v. *Brakoda Sundari Dasi*[1], the Court said :

> "In apportioning compensation money between landlord and a tenant, the principle to be followed is to ascertain first the amount of rent payable to the landlord and capitalize that rent at so many years' purchase, then to put a money value upon the chance (if there be any) of an enhancement of the existing rent. These two sums the landlord is entitled to get, and the tenant is entitled to get the balance."

In *Dinendra Narain Roy* v. *Titaram Mukerjee*[2] the Court was of the view that in apportioning such compensation the Court ought to proceed on the principle of ascertaining what the value of the interest of the landlord is on the one hand, and that of the tenant on the other, and to divide the sum awarded between them in accordance with these values and where the rent is fixed in perpetuity the landlord is not entitled to more than the capitalized value of his rent. Reference was also made to *Sadasheorao Krishnarao Buti* v. *Collector, Nagpur*[3], and in *Collector of Dacca* v. *Gholam Kuddus Choudhury*[4], where the learned Judges approved of the rough and ready method of settling the matter of apportionment as between the landlord and tenant as they would have it that there can be no rule of general application applicable to such cases involving apportionment. In the case under consideration we are concerned with a lease for a fixed term, may be for an extended period beyond sixty years. Under the lease the first claimant is entitled to purchase the buildings after the expiry of the period of sixty years from the sub-lessees of the land. It is only in cases where they are unable to purchase the buildings for lack of finance or any other circumstance the second claimant would be entitled to continue in possession of the land as lessee thereof. In view of the peculiar situation that has arisen here, it would be far-fetched to assume in the instant case that by reason of such stipulation the second claimant has secured permanent lease over the property. The terms and conditions as reflected in Exhibit B-1 indicate that it is only a lease for a fixed term and it is only on that basis we should apportion the compesation in the case under consideration. We are inclined to advert to the principle laid down in *V. Ponniah Nadan* v. *T. N. Deivanai Ammal*[1], and *Thirulakshmi Ammal* v. *Special Tahsildar for Land Acquisition*[2], as the *ratio decidendi* in both these decisions is more apposite in the instant case. In *V. Ponniah Nadan* v. *T.N. Deivanai Ammal*[1] Seshagiri Aiyar, J., after elaborately considering the history of the ryotwari settlements in the Madras Presidency and in the Tirunelveli District expressed the view that mere length of enjoyment in the capacity of tenants or purakudies irrespective of other circumstances does not raise a presumption of occupancy right. In that case the learned Judge said that in respect of the interest of the tenants in the land as tenants from year to year, they are entitled to have their share of the compensation apportioned ; and they fixed it at one anna in the rupee, that is, in the proportion of 1 : 16. No doubt in that case the tenancy was held to be a tenancy from year to year. But here in this case, the second claimant claims that he is in any event entitled to be a tenant for a period of sixty years, subject of course to the various obligations undertaken by him. Therefore, he would not be entitled to the interest on the entire compensation as a matter of right. Certain equities have to be found and adjustments have to be made. Even so, in *Thirulakshmi Ammal* v. *Special Tahsildar for Land Acquisition*[2], Palaniswamy, J., speaking for the Bench said that mere

1. I.L.R. 28 Cal. 146.
2. I.L.R. 30 Cal. 801.
3. A.I.R. 1942 Nag. 86.
4. A.I.R. 1936 Cal. 688.

1. 36 M.L.J. 463 : 9 L.W. 453 : 52 I.C. 247 : 26 M.L.T. 311.
2. (1973) 2 M.L.J. 317 : 86 L.W. 613 : A.I.R. 1974 Mad. 182.

long possession, fixity of rent, etc., would not justify an inference of permanent occupancy right. Therefore the second claimant's right in the compensation awarded has to be worked out on the basis that he has interest in the property for a period of sixty years; but that interest is subject to the performance of certain obligations which he has shouldered under it.

13. We are inclined to follow the equitable and justifiable method of evaluation enunciated by this Court in *The Raja of Pittapuram* v. *The Revenue Divisional Officer, Cocanada*[1], in preference to any other principle. There the learned Judges, were of the view that where lands are acquired in which tenants claim certain rights, the market value of the property has to be ascertained and thereafter the interest of the tenant has to be evaluated and then the balance has to be paid over to the landlord. In the instant case the market value has been ascertained and the only thing that has to be done is to evaluate the value of the tenant's interest and subtract the same from the compensation and pay over the balance to the first claimant. We respectfully adopt the principle in the above decision which says that the difference between the market value and the value of the tenant's interest represents the landlord's interest.

14. It is in the above context the contention of Mr. M.S. Venkatrama Iyer that the tenancy has become an unprotected tenancy in the sense that the second claimant totally lost his right to claim any compensation by reason of an open breach of his obligations and covenants under the lease deed Exhibits B-1 has to be considered. It is said that the reversionary interest of the first claimant remains intact as the second claimant's interest in the land has practically become nil because of his inactivity in not pursuing the lay out and obtaining a sanction from the Corporation of Madras. We may at once point out that the plea of frustration, which was raised in the lower Court and which also did not find favour with it, was not seriously persed by Mr. M.S. Venkatrama Iyer. But what is sought be now argued, though not based on the doctrine of frustration is a contention which is closely allied with it. It is no doubt true that the 2nd claimant did not diligently follow up his application for lay-out made to the Corporation of Madras. It is also equally true that if there is really a breach of the condition of a lease, the mere acceptance of a rent beyond the date when such alleged breach is proved would not estop the landlord from relying upon it so as to make it appear that the lease has become unprotected and the reversionary interest of the first claimant is intact and the value of the lessee's interest in the property has become nil. But what has to be noticed in this case is whether the second claimant has so conducted himself as to lose his totality of interest in the demised property for all purposes. We have already referred to the necessary facts. The anxiety of the lessee to improve the property as proposed by him in the course of negotiations with the Charities to obtain a lease over the property cannot be denied. Even before he obtained possession of the property, but being assured that he would obtain a lease of the property pursuant to the readiness and willingness of the first claimant to accept him as the lessee, he submitted an application for lay-out, ear-marked the plots in the land and the proposed roads as well and was taking such steps as were possible in the circumstances to improve the land. The Court granted leave to the first claimant to lease the lands in terms of Exhibit B-1 to the lessee by its order dated 1st July, 1960. It was this which encouraged the second claimant to approach the Corporation with the necessary plans for plotting out the land for building sites. It is equally true that he was asked in the letter dated 7th February, 1961, that he should deposit a sum of Rs. 70,985. But the significant feature in this case is that on that date he did not even obtain possession of the land from the first claimant. He could obtain it only in March, 1961. The second claimant expressed his readiness to proceed with the improvement works in his letter dated 2nd September, 1961, and was obviously making arrangements to deposit the large amount claimed by the Corporation by way of improvement expenses. But in the year 1962 the

1. 36 M.L.J. 455: 51 I.C. 656: I.L.R. 42 Mad. 644.

Government proposed to acquire the land. It is not very difficult to imagine that if a proposal to acquire private lands is taken up by the Government, it acquires certain publicity and becomes known even before the formal proposal for the purpose is put into action by the Government. Presumably it was in those circumstances that the second claimant was delaying action on his part in the matter of the compliance of the demand made by the Corporation and in the matter of the further pursuing of his lay-out application. Thus the cumulative facts do not give us the impression that the second claimant created a voluntary cessation of his interest in the demised property, nor could it be said that it has become an unprotected lease for all purposes. No doubt, the second claimant was not active as it could be expected. But on that ground it cannot be said that he was inactive. Mr. T. R. Ramachandran would say that the first claimant himself did not understand such slow movement on the part of the second claimant as equatable to inactivity and that no notice of the alleged breach of the conditions of lease was given by the first claimant so as to make the leasehold interest of the second claimant in the property as an unprotected and valueless one. There is considerable force in this argument. If the first climant as lessor, who had the right to act in the situation discreetely or otherwise, kept silent about it and did not call upon the lessee to act in accordance with the lease, then we are unable to accept the extreme contention of Mr. M.S. Venkatrama Iyer that the moment the second claimant became inactive and did not press the lay-out application in a manner known to law the entire reversionary interest of the first claimant automatically sprung to the fore totally eclipsing the right of the second claimant in the property.

15. But reliance was placed upon the decisions of English Courts by Mr. M.S. Venkatrama Iyer to sustain his argument that if there is a breach of a condition in the lease, no notice of determination of such a lease is necessary, since the situation has to be undertood as making the tenancy an unprotected tenancy resulting in the instantaneous vesting of the reversionary interest of the lessor in the property. No doubt In re *in Arbitration between Morgan and the London and North Western Railway Company*[1], the Court said on the facts of that case that the land in question became free from the lease and that the owners were the only persons who can make a title to the land. But there one of the stipulation in the lease was that " in case the demised premises or any part thereof shall be required or taken by a railway or other public company under the power or authority of an Act of Parliament, then and in such a case it shall be lawful to the lessors to re-enter into and upon so much of the said premises hereby demised as is so required and to have such premises again and repossess as of their former estate". In the light of this, when notice to treat was given the learned Judges came to the conclusion that such a notice put an end to the right of the parties to interfere with the land. This principle was also accepted by the House of Lords in *Rubby Joint Water Board* v. *Shaw Fox*[2],. The learned Law Lords stated the principle thus :

> " In the present case the interest of the respondents as landlords, before it was affected by the scheme, was a reversion to a protected tenancy. The scheme converted it into a reversion to an unprotected tenancy and thereby enhanced its value. "

16. The Board also accepted the prinple that every one's interest shall be valued *rebus sic stantibus*, just as it occurs at the very moment when the notice to treat was given. Any difference in the result which is due to the accident of the propertybeing taken by a public body is not to be thrown into the compensation fund.

17. As we said, the above principles were laid down on the facts of those cases. In this case we have seen that clause 7 does not make the protected tenancy an unprotected one within the meaning of the Law Lords in the above case. On the other hand, if there is a breach in the matter of the splitting of the property as building sites and improving the property, the first claimant is entitled to demand two years rent from one month from the date

1. (1896) 2 Q.B. 469 at 473.
2. (1972) 2 W.L.R. 757.

of notice, failing which only the first claimant is at liberty to determine the lease and forfeit the deposit of Rs. 5,000. It is common ground that there was no such demand as contemplated in clause 7, nor did at any time the first claimant give out that it intended to determine the lease. The protected lease therefore continued to be protected and there was no interruption in the right of the second claimant over the demised property.

18. Still the question remains having regard to certain peculiar features in the lease under consideration, as to what is the right which the second claimant had on the date when the notification under section 4 (1) was made. This lease is peculiar in the sense that the lessee's interest in the demised property is subject to certain obligations which the second claimant should perform as such. No doubt there has not been a pragmatic fulfilment of the obligations so undertaken by the lessee. But he has undoubtedly taken steps towards such fulfilment. If this aspect is borne in mind, then it becomes necessary for us to value the lessee's interest in this peculiar lease bearing in mind the method of valuation of the tenant's interest laid down in *The Raja of Pittapuram* v. *The Revenue Divisional Officer, Cocanada*[1].

19. That the second claimant is not entitled automatically to the return on the entire compensation is clear from the fact that it is not an ordinary lease as is popularly understood. The special features which were agreed to between the parties have certainly an impact on the value of the leasehold interest of the second claimant in the property. This has to be necessarily taken into consideration in reckoning the net or the ultimate value of such interest of the second claimant. Mr. T.R. Ramachandran placed considerable reliance on a decision of the Bombay High Court reported in *Dossibai N. Jeejeebhoy* v. *Pestonji M. Bharucha*[2]. A Division Bench of the Bombay High Court re-stated the well known principle that "person interested" and "person interested in the land" contemplate not merely legal or proprietary interest of a person, but include such interest as will sustain a claim to share the compensation with the owner of the land. In that connection it laid down three principles of apportioning compensation between the landlord and a tenant. They are :

> "(*i*) to value their interests separately, and deduct from the compensation the value of the interest of one party and award the balance to the other ; (*ii*) if the aggregate of the two values does not reasonably correspond to the amount of compensation, to value their interests separately and to distribute the compensation, in proportion to the two values; (*iii*) if a reasonably precise valuation is not possible, to evaluate their interests in terms of fractions of the total amount of compensation regarded as a single unit. In each case the Court must adopt that method which, having regard the circumstances and the materials available, equitably distributes the compensation."

In that case it was a 99 years lease and the learned Judges divided the compensation in the proportion of ten annas in the tenant and six annas to the landlord. As we noticed already, this they did after taking into consideration the circumstance in peculiar facts. Again in *Bai Sarasuathi Jeshankar* v. *Bharatkhand Textile Manufacturing Company Limited*[1], the learned Judges quoted with approval principle in *Dossibai N. Jeejeebhoy* v. *Pestonji M. Bharucha*[2], and in the case of a permanent lease which was considered by them, they gave one-fourth of the compensation to the landlord and three-fourths to the tenant. In all these cases the broad principle of evaluation, which as we stated evaded precise analysis, has to be adjudged on equitable considerations after noticing the problem which might arise in each of the cases. The interest which may be varied and different of the various parties interested in the land, has to be evaluated with reasonable precision and the compensation equitably distributed amongst them. The fundamental *sine qua non* before apportionment is that every conceivable interest in

1. I.L.R. 42 Mad. 644: 36 M.L.J. 455: 51 I.C. 656.
2. 60 Bom. L.R. 1208 : I.L.R. 1959 Bom. 370.

1. A.I.R. 1967 Guj. 36.
2. I.L.R. 1959 Bom. 370: 60 Bom. L.R. 1208.

the land of the various persons before the Court has to be noticed before an ultimate analytical recording of such compensation and the formula of distribution is found. The learned City Civil Judge accepted in the instant case the suggestion made by the first claimant in its written statement that in the peculiar circumstances and heving regard to the problems posed the first claimant would be entitled to four-fifths of the compensation and the second claimant to the balance of one-fifth thereto. It is therefore for consideration whether in the instant case the second claimant would be entitled to anything more than one-fifth of the compensation awarded by the Court below.

20. It is by now accepted that in a lay-out one-fourth of the area should be left out of consideration since they have to be so provided for road-making and public amenities. If this is taken out, then roughly 100 grounds would be the subject-matter of the demise. Under Exhibit B-1 the second claimant has assumed responsibility to lay out the entire land at his cost without unnecessary delay, bear all the charges towards laying of the roads, drainage, electricity payable to the Corporation and also simultaneously agreed that he would obtain sanction from the Corporation to field within one year from the date of sanction of the lay-out. It does not lie in the mouth of the second claimant now to say that the lay-out has not been sanctioned and the supervening acquisition prevented him from acquiring such sanction. No one can predicate as to what would have happened if the second claimant pursued the subject and complied with the demand of the Corporation as made in September, 1971. Obviously the second claimant was scared. He did not have the mind to proceed further though he was inclined to stick on to his rights and interest over the land. These factors also have to be taken into consideration. He had the right to sublease and obtain from his lessees the rent as stipulated by him subject only to his obligation to pay to the first claimant a rent of Rs. 5 per ground for the first thirty years, Rs. 7.50 per ground for the subsequent thirty years, and a sum of Rs. 9 per ground if by any chance he continues to be a lessee due to the first claimant's inability to purchase the superstructures on the land at the end of sixty years. We have already stated that the net available area of the second claimant for purposes of leasing out to his lessees would be about 100 grounds. He has to pay taxes, rates and assessments that may become due or payable during the term of the lease in respect of the leased plots or of the structure and buildings raised. The only obligation on the part of the first claimant was to pay quit rent to Government, which is now the urban land tax. Assuming that the second claimant would be able to realise a rent of Rs. 15 per month per ground from his sub-lessees, then computing this income after deducting therefrom the rent taxes etc. the second claimant would only be entitled to a net income ranging between Rs. 1,000 to Rs. 1,200 a month. Capitalising this amount and taking the ruling rate of interest at 6 per cent. per annum at or about the time of acquisition, the second claimant would only be entitled roughly to a sum between 1,50,000 and Rs. 2,00,000. This is what the first claimant itself was prepared to pay. As no mathematical exactitude or accuracy is possible in the evaluation of such varied and complicated interests we are not satisfied that a revision in the amount awarded as compensation to the second claimant by the Court below is called for in the instant case. We sustain the decree and judgment of the Court below. In the result the appeal is dismissed, but in the peculiar circumstances of the case, the parties will bear their own costs. As we have not accepted the case of the first claimant that an automatic termination of the lease had taken place or in the alternative, the lease in favour of the second claimant had become an unprotected one and that therefore the second claimant is not entitled to any portion of the compensation amount, and as the first claimant has itself stated in its written statement that if the total compensation amount is to be apportioned between itself and the second claimant, it may be apportioned in the ratio of 4/5ths and 1/5th and the apportionment has been done by the IVth Assistant Judge in accordance with this request, the memorandum of cross-objections filed by the first claimant is devoid of merit. Hence,

we dismiss the memorandum of cross-objections also. No costs.

R.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Ratnavel Pandian, J.*

The Assistant Collector of Central Excise, Erode *Petitioner**

v.

Achal Singh *Respondent.*

Customs Act (LII of 1962), sections 137 (b)(2), 111 and 112 and Gold Control Act (XLV of 1968), section 85 (3) and (4)—Seizure of gold with foreign markings —Admission of guilt by the accused—Sentence—Lesser sentence —Existence of no special circumstances—Lesser sentence not to be awarded—Goods confiscated—To vest with the Central Government.

The accused was convicted under section 135 (*b*) (*ii*) read with sections 111 and 112 of the Customs Act and section 85 (*iii*) and (*iv*) read with sections 8 (*i*), 27 (*i*), 71 and 74 of the Gold Control Act on the allegation that on 17th July, 1972 he was found to be in possession of 5 gold bars with foreign markings of the purity of 24 carats, without a valid permit. The accused admitted that he purchased these gold bars for the purpose of sale, that he voluntarily learnt this kind of profession from others knowing the full impact of the offence, and also that he knew that what he did was an offence. The Magistrate convicted him of both the offences and sentenced him to suffer imprisonment till the rising of the Court and to pay a fine of Rs. 150. In respect of the gold bars seized he passed an Order confiscating the same to the State. The revenue filed the Revision Petition, seeking enhancement of the sentence.

Held, in view of the proviso to section 85 of the Gold Control Act, the sentence is liable to be enhanced to one of imprisonment for 6 months rigororus Imprisonment in addition to the fine already imposed. [*Para.* 7.]

Under the proviso to section 85 of the Gold Control Act, in exercising the discretionary power in awarding the sentence of imprisonment for a term less than 6 months, it is imperative that the Court must be satisfied with the special circumstances of the case requiring the taking of such a lenient view. The term 'special circumstances of the case' is wider than the term 'special reasons'. The circumstances also must be special in the sense that there should be difference from the normal. If Parliament has said that *prima facie* the penalty for the particular conviction is to be imprisonment, it is the duty of the Court to impose imprisonment, unless there are special circumstances of such a kind as to justify it in passing a lighter sentence as contemplated in the relevant penal provision. [*Para.* 5.]

On facts: Having regard to the facts admitted by the accused in this case, there are no special circumstances requiring the Court to impose any sentence less than six months. [*Para.* 6.]

Also held. The order of the lower court that the goods shall be confiscated to the State is to be set aside and the goods confiscated in this case shall vest with the Central Government. [*Para.* 7.]

Also held: A scrutiny of section 85 of the Gold Control Act as amended under Act XXXVI of 1973 prescribing the guide lines clearly indicates that in economic offences of this kind, the special circumstances should be of such a nature which would have a relation to the offences and not to the offender. Under the said amendment the facts that the accused is a first offender, that the accused has suffered a penalty, that the goods have been confiscated and any other action has been taken against him for the same act and that the accused was not the principal offender and was acting merely as a carrier of goods or otherwise was a secondary party to the commission of the offence and the age of the accused shall not be considered as a special and adequate reason for giving such a lesser sentence. [*Para* 5.]

Cases referred to :—

Jayantilal Devichand, In re, (1973) L.W. (Crl.) 193 ; *Mohan Sinha* v. *Amulya*

* Crl.R.C.No. 954 of 1973 and Crl.R.P.No. 941 of 1973. *7th March*, 1975.

Kumar Biswas and others, (1974) Cr.L.J. 885; *Balakrishana Chhaganlal Soni* v. *State of West Bengal*, (1974) M.L.J. (Crl.) 267: (1974) Crl. L.J. 280: A.I.R. 1974 S.C. 120.

Petitions under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate, Erode, dated 18th July, 1973 and passed in Calendar Case No.266 of 1973.

G. Ramaswami, Central Government Prosecutor and *K.M. Srirengan*, for Petitioner.

K.A. Panchapakesan, for Respondent.

The Court made the following

ORDER :—The petitioner, who was the complainant in C. C. No. 266 of 1973 on the file of the Sub-Divisional Magistrate, Erode, has filed this revision petition for enhancement of the sentence imposed on the respondent-accused by the lower Court.

2. The respondent accused was tried by the learned Magistrate for offences punishable under section 135 (*b*) (ii) read with sections 111 and 112 of the Customs Act and section 85 (*iii*) and (*iv*) read with sections 8 (*i*), 27 (*i*), 71 and 74 of the Gold (Control) Act. According to the prosecution, the petitioner, the Assistant Collector, Central Excise, Erode filed a complaint against the respondent with the allegation that on 17th July, No. 1972, at 11 A. M. in door No. 270, Nethaji Road, Erode, in the shop of one Sri Mangilal Nemichand, he was found to be in possession of five gold bars with foreign markings "*Credit Suisse* 999, 0-10 tolas *Chi Essayeur Pordeur*" without a valid permit. The said gold bars bearing foreign markings were seized from the possession of the respondent under a mahazar attested by independent witnesses. The Inspector of Central Excise, Erode, was examined as P.W. 1. He speaks about the seizure of the gold bars which were of the purity of 24 carats. The accused had no permit or document for valid possession of the same. Exhibit P-1 is the mahazar prepared for the seizure, copy of which was also served on the respondent-accused. Exhibit P-2 is the statement given by the respondent-accused, admitting the possession of the seized gold bars. The accused was arrested and sent for remand. Further, P.W. 1 speaks about the issue of Exhibits P-3 and P-4, the show-cause notices by the Deputy Collector and the reply Exhibit P-5 given by the respondent-accused. Exhibits P-6 and P-7 are adjudication proceedings, as per which M.Os.1 to 11 were confiscated and in addition to that, a penalty of Rs. 1,200 was imposed on the accused for the offences under the two Acts. Exhibits P-8 and P-9 are the sanction orders authorizing the prosecution of the accused. The accused voluntarily pleaded guilty under both the charges. The learned Magistrate, acting on the evidence of P. W. 1 and on the voluntary plea of guilt of the accused, convicted him of both the offences and sentenced him to suffer imprisonment till the rising of the Court and to pay a fine of Rs. 150 on each count, in default to suffer rigorous imprisonment for six weeks. In respect of M. Os. 1 to 11, he has passed an order confiscating the goods to the State. As mentioned *supra*, this revision petition has been filed for enhancement of the sentence and for modification of the order of confiscation, as contemplated under section 126 (2) of the Customs Act, which says that the officer ordering confiscation shall take and hold possession of the confiscated goods since the goods confiscated under the Customs Act vest in the Central Government as per section 126 (1) of the Customs Act.

3. The learned Prosecutor for the Central Government urges that the gold seized in this case is of the purity of 24 carats weighing 582.200 grams, the value of which is estimated at Rs. 13,680 and that section 135 (*b*) (ii) of the Customs Act provides for punishment with imprisonment for a term of two years or with fine or with both, and that section 85 of the Gold (Control) Act before the amendment under Act (XXXVI of 1973) provides as follows :—

"Whoever, in contravention of the provisions of this Act or any rule or order made thereunder,—

.. ..

(*iii*) buys or otherwise acquires, or accepts or otherwise receives, or agrees to buy or otherwise acquire or to accept or otherwise receive, any primary gold, or

(*iv*) sells, delivers, transfers or otherwise disposes of, or agrees to sell, deliver, transfer or otherwise dispose of, or exposes or offers for sale, delivery, transfer or disposal, any primary gold,

.. ..

shall, without prejudice to any other action that may be taken under this Act, be punished with imprisonment for a term which shall not be less than six months but not more than three years and also with fine :

Provided that the Court may, if it is satisfied that the special circumstances of the case so require, impose a sentence of imprisonment for a term which may be less than six months."

Therefore, he urges that unless the Court is satisfied that the special circumstances appearing in the case so require, it shall impose a sentence of imprisonment of not less than six months and that only in cases where the said circumstances so required, the sentence for a term less than six months could be imposed. It is thus contended that in the instant case, no such special circumstances exist and the learned Magistrate also has not given any reason for imposing the sentence of imprisonment till the rising of the Court, and the learned Magistrate has not understood the full implication of the proviso, and therefore the sentence should be enhanced. The learned counsel appearing for the respondent resists this by saying that the accused in this case is a young boy aged about 20 and is a first offender. In Exhibit P-2 he has also explained as to how he came into possession of the gold bars at Madras and thus admitted the offences and pleaded for mercy. He had also suffered a penalty of Rs. 1,200 in addition to the confiscation of the goods. Therefore, Mr. Panchapakesan, learned counsel appearing for the respondent, argues that under these circumstances the lower Court is justified in minimising the sentence having regard to the mitigating circumstances. In support of his contention, Mr. Panchapagesan has relied on a decision in *Jayantilal Devichand, In re*[1], wherein N. S. Ramaswami, J., after confirming the conviction of the two accused in that case for the offences under section 135 (*b*) (ii) of the Customs Act, had imposed only a sentence of fine. That was a case where the accused were found guilty only under section 135 (*b*) (ii) of the Customs Act, for which no minimum sentence is prescribed. In the present case, the accused has been convicted not only under section 135 (*b*) (ii) of the Customs Act, but also under section 85, clauses (*iii*) and (*iv*) etc., of the Gold (Control) Act, for which a minimum sentence has been prescribed. There cannot be any hard and fast rule in imposing a sentence. That depends upon the facts and circumstances of each and every case.

4. Further, the learned counsel invited my attention to a decision of the Supreme Court in *Arvind Mohan Sinha* v. *Amulya Kumar Biswas and others*[2], wherein the Supreme Court confirmed an order releasing the accused under the Probation of Offenders Act, and pleaded that the petitioner in this case also could be leniently dealt with. Their Lordships of the Supreme Court had only gone into the question whether the Probation of Offenders Act could be invoked for offences contravening the provisions of the Customs Act, Part XII-A of the Defence of India Rules, 1962, and held that there can be no legal impediment in applying the provisions of the Probation of Offenders Act, because in the view of their Lordships, every contravention of the provisions of the said Act and Rules cannot, without more, be assumed to be fraught with consequences of national dimensions and that the broad principle that punishment must be proportioned to the offence is or ought to be of universal application save where the statute bars the exercise of judicial discretion either in awarding punishment or releasing an offender on probation in lieu of sentencing him forthwith. However, it is

1. (1973) L.W. (Crl.) 193.
2. (1974) Crl. L.J. 885.

significant to note that in the above Supreme Court case, the release of the accused under the Probation of Offenders Act was justified, in the view of their Lordships, by the facts in the case, the defence taken by the accused and various circumstances culminating in the report of the Probation Officer in the trial Court. But, the facts in the instant case with particular reference to the admission made by the petitioner himself in Exhibit. P-2 can by no stretch of imagination warrant such exercise of judicial discretion to release the petitioner on probation. To sum up, the principle enunciated by their Lordships of the Supreme Court in the above case cannot be extended to the facts of the present case. On the contrary, the circumstances appearing in this case would warrant a deterrent sentence on the petitioner.

5. The learned Prosecutor for the Central Government, relying on the decision of the Supreme Court in *Balakrishna Chhaganlal Soni* v. *State of West Bengal*[1], wherein Krishna Iyer, J., rejecting the plea of the learned counsel for the accused in that case, for elimination of imprisonment on the ground that gold of considerable value has been confiscated and the accused had gone out of business and that the possibility of further mischief was absent and some jail term had also been undergone by him etc., observed as follows :—

> "The new horizons in penal treatment with hopeful hues of correction and rehabilitation are statutorily embodied in India in some special enactments; but crimes professionally committed by deceptively respectable members of the community by inflicting severe trauma on the health and wealth of the nation—and the numbers of this neo-criminal tribe are rapidly escalating—form a deterrent exemption to humane softness in sentencing.
>
> The penal strategy must be informed by social circumstances, individual factors and the character of the crime. India has been facing an economic crisis and gold smuggling has had a disastrous impact on the State's efforts to stabilise the country's economy. Smugglers, hoarders adulterators and others of their like have been busy in their under-world because the legal hardware has not been able to halt the invisible economic aggressor inside. The ineffectiveness of prosecutions in arresting the wave of white-collar crime must disturb the Judge's conscience. While we agree that penal treatment should be tailored to the individual, in the extreme category of professional economic offenders, incarceration is peculiarly potent. .. When all is said and done, the offences for which the appellant has been convicted are typical of respectable racketeers who, tempted by the heavy pay-off, face the perils of the law and hope that they could smuggle on a large scale and even if struck by the Court they could get away with a light blow."

The Parliament, after having seriously considered, the impact of the activities of people dealing in offences of this sort, on our country's economy has amended the penal provisions of the Gold (Control) Act. For offences under clauses (*i*), (*ii*), (*iii*), (*i*) and (*viii*) of section 85 of the Gold Control Act, the Parliament has increased the sentence of imprisonment from the maximum period of three years as originally fixed before amendment to the maximum period of seven years if the value of the gold involved exceeds Rs. one lakh, and in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the Court, such imprisonment shall not be for a period of less than six months. I am mentioning about this amendment to show how seriously the Parliament views these economic offences. They have also introduced, by Act XXXVI of 1973, sub-sections 9 (2) and (3), to section 85 of the said Act. In sub-section (3), they have not set out certain guidelines to the Courts while giving reasons for reducing the sentence for a term of less than six months under sub-sections (1) and (2). As per the said amendment, the facts that the accused is a first offender, that the accused has suffered a penalty that his goods have been confiscated and any other action has been taken against him for the same

1. (1974) M.L.J. (Crl.) 267: A.I.R. 1974 S.C. 120.

act and that the accused was not the principal offender and was acting merely as a carrier of goods or otherwise was a secondary party to the commission of the offence, and the age of the accused, shall not be considered as special and adequate reasons for giving such a lesser sentence. Generally, the abovesaid grounds are also taken by Court as extenuating circumstances for awarding a lenient sentence. But the Parliament has now introduced the new amendment by circumscribing the discretion of the Court in awarding lesser sentence on the abovesaid grounds regarding offences punishable under section 85 of the Gold (Control) Act. However, since the offence in this particular case has been committed on 17th July, 1972 we have to see whether the lower Court has committed any error in using its discretion in awarding a sentence of imprisonment till the arising of the Court, in the face of the proviso to section 85. To use the discretionary power in awarding sentence of imprisonment for a term less than six months, it is imperative that the Court must be satisfied that *the special circumstances of the case require* the taking of such a lenient view. The term "special circumstances of the case" is wider than the term "special reasons". But, it is to be noted that the normal punishment for offences under section 85 is imprisonment and it is also to be remembered that the discretion that is given to the Courts is to be exercised judiciously, because the words "special circumstances" appearing in the section limit the discretion of the Court to some extent. The circumstances also must be special in the sense that they should be different from the normal. While using the circumstance for imposing lenient sentences, the primary consideration should be whether the circumstances are special to the case. When the Parliament says that the circumstances should be special, it is obviously contrasting the circumstances that are special with the circumstances that are general. The duty of the Court is to apply the law which the Parliament has laid down. If the Parliament has said that *prima facie* the penalty for this particular offence is to be imprisonment, it is the duty of the Court to impose imprisonment unless there are special circumstances of such a kind as would justify it is passing a lighter sentence as contemplated in the relevant penal provision. If there are facts found by the Courts which can amount to special circumstances, that is to say, circumstances which are special and not general and which can properly be taken into account as being special to the case, the Court would be justified in using its discretionary power. A scrunity of the section as amended under Act XXXVI of 1973, prescribing the guidelines, clearly indicates that in economic offences of this kind, the special circumstances should be of such a nature which would have relation to the offence and not to the offender. That is why the Parliament has introduced the amendment, setting out the above guidelines.

6. In the present case, in Exhibit P-2 the accused himself has admitted that he purchased these five gold bars of foreign markings at Madras for purposes of sale. He states in his statement :

"நான் இதற்கு முன் ஈரோட்டிலுள்ள அம்பிகா ஸ்டோர்ஸில் வேலை செய்து கொண்டிருந்தபோது அங்குள்ளவர்கள் இந்த வியாபாரம் செய்து வந்ததைப் பார்த்து இந்த வியாபாரம் செய்யக் கற்றுக்கொண்டேன்."

The above admission of the accused would indicate that be voluntarily learnt this kind of profession from others and under look it knowing the full impact of the offences. He has also admitted in his statement that he knew that what he did was an offence. The admission of the petitioner accused set out above is only indicative of a position justifying the imposition of a deterrent sentence and it is a far cry from special circumstances requiring the Court to impose any lenient or lesser sentence. The lower Court has not even given any reason for its awarding the most lenient sentence of imprisonment till the rising of the Court in addition to the mominal fine. The lower Court has committed a serious error in doing so. The reasons now mentioned by the learned counsel for the respondent, *viz*., his age, that he is a first, offender, that he has suffered the penalty and confiscation of the goods etc., are all irrelevant for the purpose

of giving any lighter sentence in view of my discussion concerning his own admission in Exhibit P-9.

7. Accordingly, while confirming the convictions, I enhance the sentence of imprisonment imposed on the petitioner to one of R. I for a period of six months in addition to the fine already imposed. Further, I set aside the order of the lower Court that the goods shall be confiscated to the State and in lieu of that I direct that M. Os. 1 to 11 confiscated in this case shall vest with the Central Government.

V.S. ——— *Sentence enhanced.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M.M Ismail, J.*

The Union of India, owning the Southern Railway, represented by the General Manager, having their office at Adams Park, Park Town, Madras-3. .. *Appellant**

v.

1. M/s. Davanagere Cotton Mills' Ltd., Davanagere, Mysore State.

2. The Jupiter General Insurance Co., Ltd., No. 167, Broadway, Madras-1 .. *Respondents.*

Civil Procedure Code (V of 1908), section 80—Notice to Railways—Suit filed before expiry of two months' period if premature.

Civil Procedure Code (V of 1908), section 26—"Date of institution of the suit"—Meaning of.

The language of section 80 of the Code of Civil Procedure is unambiguous, and explicit that there must be an expiration of two months' period after the service of notice on the Government or the officers concerned before the institution of the suit. The notice in the instant case was served on 12th June, 1968 and by 12th August, 1968 when the plaint was presented, the expiration of two months after delivery of notice had not taken place. The suit was therefore hit by section 80 of the Code of Civil Procedure [*Para.* 3.]

A suit is instituted when the plaint is presented for the first time. Reading sections 26 and 80 of the Code of Civil Procedure together it is clear that the date on which a plaint is presented for the first time, is the date of institution of the suit. [*Para.* 4.]

Appeal against the decree of the City Civil Court (Fourth Assistant Judge), Madras, in Original Suit No. 4570 of 1968.

P S. Srisailam, for Appellant.

T.S. Rengarajan, for Respondent.

The Court delivered the following

JUDGMENT:—The Union of India owning the Southern Railway, represented by the General Manager, Southern Railway, Madras, the defendant in O.S. No.4570 of 1968 on the file of the City Civil Court, is the appellant herein. The suit was instituted by the respondents herein for recovery of a sum of Rs. 17,000 being the damages alleged to have been suffered in relation to a boiler consigned by A.C.C. Baccok Limited, Durgapur, for carriage to Davanagere in June, 1965 to the first respondent herein. Among the various defences set up by the appellant herein, one was that the suit was premature, since the period prescribed in section 80 of the Code of Civil Procedure for institution of the suit had not expired on the date when the suit was instituted. Overruling this defence, the trial Court by its judgment and decree, dated 14th September, 1970, decreed the suit of the respondents. Hence the present appeal by the defendant in the suit.

2. Since I am reversing the decision of the trial Court on this point which goes to the root of the matter, it is unnecessary for me to consider the other points dealt with by the trial Court. Admittedly, in this case the notice contemplated by section 80, Civil Procedure Code, was sent by the respondents to the appellant on 10th June, 1968, and a copy of the notice has been marked as Exhibit-A-11. The said notice was received by the appellant on 12th June, 1968, as evidenced by Exhibit A-12, the postal acknowledgment. Equally admittdely, the plaint in the present suit was presented to the Court on 12th August, 1968. It is with reference to these facts, the appellant contended before the trial Court that the two months provided for in

* Appeal No. 368 of 1971. 21st January, 1975.

section 80, C.P.Code, had not expired on the date when the plaint was presented, namely, on 12th August, 1968 and therefore, the suit was premature and was liable to be dismissed on that ground. The learned trial Judge fully realised this position and as a matter of fact has pointed out in paragraph 8 of the judgment that on the facts of the case, it was no doubt true that the suit would have been filed on 13th August, 1968, but had been filed on 12th August, 1968. Notwithstanding this observation of the learned trial Judge he purported to decree the suit by referring to certain observations of the Supreme Court as to how the contents of the notice should be construed. I am clearly of the opinion that the learned Judge erred in his conclusion in this behalf.

3. Section 80 of the Code of Civil Procedure clearly and categorically states that no suit shall be instituted against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been delivered to or left at the office of the officers specified in this section. Thus, the section contemplates the expiration of two months next after notice in writing had been delivered. As I pointed out already, the notice in this case was served on the appellant on 12th June, 1968 and therefore by 12th August, 1968, when the plaint was presented, the expiration of two months after delivery of notice had not taken place. Consequently, on the face of it the suit instituted on 12th August, 1968 was hit by section 80, Code of Civil Procedure. This aspect of the matter is directly covered by a decision of this Court in *Messrs. Madurai K. Rangiah Chettiar & Co., Madurai* v. *The Union of India, represented by the General Manager, Madras*[1]. In that case, the notice under section 80 of the Code of Civil Procedure was issued on 7th August, 1963 and was received by the Chief Commercial Manager, Southern Railway, on 8th August, 1963 and the plaint was presented on 8th October, 1963. This Court held that after the service of the notice on 8th August, 1963, two months period had not expired by 8th October, 1963 when the suit was instituted and therefore, the suit was hit by section 80 of the Code of Civil Procedure. This decision of this Court was cited before the learned trial Judge. But the learned trial Judge held erroneously that that decision did not apply to the facts of this case. The point of distinction, according to the learned trial Judge, is that as per the reported decision of this Court, the suit would have been barred by limitation, if it was filed on 13th August, 1963. In my opinion, the construction of section 80, C.P.Code, is not dependent upon the question whether the suit if filed after the expiration of two months would be barred by limitation or not. As a matter of fact, the period of two months provided for in section 80, Civil Procedure Code, is eligible to be excluded in calculating the period of limitation prescribed in the Limitation Act and therefore, the question whether if the suit filed after the expiration of two months period would be barred by limitation or not will have no effect or influence, and should have no effect or influence, on the construction of section 80, Code of Civil Procedure. As far as section 80, Code of Civil Procedure is concerned, the language is unambiguous, express and explicit that there must be an expiration of two months period after the service of the notice on the Government or the officers concerned before the institution of the suit. Thus, it is clear that the suit in the present case was hit by section 80, Code of Civil Procedure and therefore, ought to have been dismissed.

4. Mr. Rengarajan, the learned counsel for the respondents sought to contend that though the plaint was presented on 12th August, 1968, it was returned and subsequently represented and by the time the plaint was represented, the two months period contemplated by section 80, Code of Civil Procedure had expired. I am unable to draw any inference in favour of the respondents from this fact. Section 26 of the Code of Civil Procedure provides that every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed. Therefore, a suit is instituted, when the plaint is presented for the first time. Section 80 also uses the expression "no suit shall be instituted". Therefore, a combined reading of sections 26 and 80 of the Code of Civil Procedure can lead to the only

1. 83 L.W. 164.

conclusion, namely, the date on which a plaint is presented for the first time, is the date of institution of the suit. Consequently, the fact that the plaint was returned in this case and was subsequently represented will have no effect whatever on the plea of the appellant based on section 80, Code of Civil Procedure.

5. Under these circumstances, the appeal is allowed and the judgment and decree of the learned trial Judge are set aside and the suit instituted by the respondents will stand dismissed.

6. The learned trial Judge has decreed the suit with costs. Having regard to the fact that the suit is now being dismissed only a tehnical ground, I consider it is only proper and just that both parties should be directed to bear their respective costs throughout.

R.S. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Sethuraman, J.*

Ramalinga Reddiar ..*Appellant**

v.

Radhakrishnan ..*Respondent.*

(A) *Tamil Nadu Agriculturists Relief Act* (IV *of* 1938), *section* 20—*Execution—Application under section* 20—*Dismissal—Whether appealable.*

The dismissal of a petition under section 20 of Act IV of 1938 gives rise to a right of appeal. [*Para.* 6.]

(B) *Civil Procedure Code* (V *of* 1908), *section* 42—*Decree for Rs.* 25,000 *transferred for execution to District Munsif's Court by Sub-Court—Application by judgment-debtor under Act* IV *of* 1938—*Dismissal—Appeal to Sub-Court—Whether valid—Scope of section* 42, *Civil Procedure Code.*

The Sub-Court passed a decree for a sum of Rs. 25,000 with interest thereon on a joint memo. This decree was transmitted to the District Munsif's Court for execution. Before the executing Court, the judgment-debtor filed a petition under section 20 of Act IV of 1938 claiming benefits thereunder. This was dismissed. Against this order, the judgment-debtor filed an appeal to the Sub-Court. The respondent contended that the appeal should have been filed in the High Court directly and not in the Sub-Court. On the question whether the appeal to the Sub-Court is correct.

Held : In view of the decision in *A.P. Jambulinga Mudaliar* v. *A. S. Vadivelachari and others*,[1] (1956) 1 M.L J. 72, there is no substance in the objection of the respondent that the appeal to the Sub-Court was incompetent. Section 42 of the C.P. Code is a special provision and therefore, it will override any general provision. [*Paras.* 7 *and* 8.]

Cases referred to:—

M. Desikachariar v. *Ramachandra Reddiar*, (1951) 1 M.L J. 23 : 64 L.W. 10: A.I.R. 1951 Mad. 56; *A.P. Jambulinga Mudaliar* v. *A.S. Vadivelachari and others*, I.L.R. (1956) Mad. 889 : (1956) 1 M.L.J. 72 : 68 L.W. 848: A.I.R. 1956 Mad. 390; *A. Venkataraman and another* v. *A.R. Srinivasa Sastrigal*, I L.R. (1944) Mad. 378 : (1943) 2 M.L.J. 352 : 56 L.W. 514: A.I.R. 1944 Mad. 31.

Appeal against Appellate Order of the Court of the Subordinate Judge, Tiruvannamalai, dated 14th February, 1974 and made in C.M.A. No. 34 of 1973, preferred against the order in R.E.A. No. 1995 of 1973 in R.E.P. No. 1613 of 1973 on the file of the District Munsif, Tiruvannamalai, in O.S. No. 281 of 1969, of the Court of the Subordinate Judge, Cuddalore.

R.S. Venkatachari, for Appellant.

K. Sampath, for Respondent.

The Court made the following

ORDER:—The judgment-debtor is the appellant herein. A decree was passed against him by the Sub-Court, Cuddalore, in O.S. No. 281 of 1969. The decree was passed on a joint memo. Under the decree a sum of Rs. 25,000 was payable with interest at 6 per cent. per annum. The amount was payable in monthly instalments of Rs. 1,500 the first instalment to start on 7th December, 1971. As only three instalments were paid, on the application of the decree-holder the decree was transmitted for execution to the District Munsif's

*A.A.A.O. No. 44 of 1974. 21st February, 1975.

Court, Tiruvanamalai. Before the executing Court, a petition under section 20 of the Tamil Nadu Agriculturists Relief Act, 1938 (IV of 1938) was filed. The learned District Munsif dismissed the application on 10th October, 1973 saying that it was not stated in the petition under what provision of the Act the petitioner was claiming benefit. Even taking for granted that the petitioner was an agriculturist, he pointed out, that under the compromise decree, interest was claimed only at less than 3 per cent. (This is wrong, as under the joint memo. interest was payable at 6 per cent. He held that the petitioner had failed to establish that he was entitled to the benefits of that Act and that he was not entitled to the prayer for stay under section 20.

2. Against this order there was an appeal to the Sub-Court, Tiruvannamalai. The learned Subordinate Judge also pointed out that the appellant had not placed any material before the Court to show that he was an agriculturist and that he was entitled to the benefits of that Act. He observed also that the rate of interest worked out to less than 3 per cent. (this is wrong) as against the contract rate of 12 per cent. and that the appellant had not paid any amount before the suit, except the three instalments, as per the decree. He held that the dismissal of the petition was proper, as the petitioner-appellant had not shown as to how he was claiming the benefit of the Act.

3. In the present appeal the submission of the learned counsel for the appellant was that he had materials before him to show that he was an agriculturist and that unfortunately the matter had not been properly enquired into by the Courts below. It was submitted that the Courts were wrong in proceeding as if the appellant had to demonstrate the kind of benefit that he was praying for under the Act, in the application under section 20. The petition under section 20 of the Act, being only for stay of the execution proceeding, it was submitted that the relevant materials to show the kind of benefit he was asking for would have to be placed in the proceedings under section 19 of the Act, that were to follow. In these circumstances, the dismissal of the petition under section 20 of the Act, it was submitted, was not proper. On behalf of the respondent there was a preliminary objection saying that the appeal filed against the dismissal of the petition under section 20 of the Act, to the Sub-Court was not competent and that the present second appeal was also incompetent, as the Sub-Court, had no jurisdiction to deal with this matter. It was further submitted that the burden to show that he was an agriculturist was on the appellant and that as he had not done so far, the dismissal of the petition cannot be complained of. In this connection the learned counsel drew my attention to the averments in the plaint that the appellant was not an agriculturist, which had not been denied in the written statement. The further submission on behalf of the respondent was that the appeal should be dismissed *in limine*, as there was no right of appeal against the proceedings under section 20 of the Act.

4. Section 25-A of the Act, provides, that an appeal shall lie from any of the orders set out in the section passed by a Court under the said Act, as if such order related to the execution, discharge or satisfaction of a decree within the meaning of section 47 of the Code of Civil Procedure. There are seven types of orders referred to in clauses (*a*) to (*f*). But there is no reference to any order under section 20 to be found therein. Sub-section (2) provides that from any order passed on an appeal presented to it under the provisions of sub-section (1) by a Court subordinate to the High Court an appeal shall lie to the High Court on any of the grounds mentioned in sub-section (1) of section 100 of the Code of Civil Procedure. The point that I have to examine is whether the order passed under section 20 of the Act dismissing the petition is appealable or not.

5. This matter has been the subject of consideration by a Full Bench of this Court, the decision being reported in *M. Desikachachariar* v. *Ramachandra Reddiar*[1] Subba Rao, J., as he then was after considering the authorities cited therein held that an order under section 20 of the Agriculturists Relief Act dismissing an application for stay of execution was an appealable order. This decision has also

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1. (1951) 1 M.L.J. 23: 64 L.W. 10: A.I.R 1951 Mad. 56.

been recently followed in *Kamal Rawther* v. *Jayaram Gupta*[1].

6. The learned counsel for the respondent submitted that none of these decisions had considered the impact of section 25-A. on the right of appeal claimed by the appllant against the order under section 20 of the Act. The first point was that an appeal is only a creature o the statute and that there could be no presumption that any appeal would lie from any order of any Court. Section 25-A was inserted by section 3 of Madras Act XV of 1943 and re-enacted permanently by section 2 of Madras Act VII of 1948. It was given retrospective effect from 27th October, 1939. So at the time when the Full Bench was deciding the issue of the appealability of order under section 20 of the Act, section 25-A was very much in the statute. The Court has considered the relevant provisions, though section 25-A is not specifically to be found referred therein. I do not think that this provision is likely to have been overlooked when the Full Bench passed this judgment. I am satisfied that the deeision of the Full Bench would apply fully to the facts herein and that the dismissal of the petition under section 20 of the Act gives rise to a right of appeal.

7. The next question is as to the forum to which this appeal has to be taken. The learned counsel for the respondent submitted that the right of appeal if at all could only be to this Court directly and not to the Court of the Subordinate Judge. It was therefore, submitted that the present appeal had to be dismissed as incompetent. Even here there is a decision of a Bench of this Court in *A.P. Jambulinga Mudaliar* v. *A.S. Vadivelachari and others.*[2] That was a case in which a decree was passed by this Court and then it was transferred under Order 19, rule 2 of the Original Side Rules corresponding to section 39 of the Code of Civil Procedure to the Court of the District Munsif of Ranipet for execution. Before the executing Court, there was an application for dismissing the execution petition on the ground that as the amount sought to be recovered by attachment and sale of the properties related to costs taxed against the defendants, execution could be taken only against the properties charged and not against the other properties of the judgment-debtor. The learned District Munsif uphold the contention of the judgment-debtors and dismissed the execution petition. Against the dismissal of the execution petition, an appeal was filed before the District Court, North Arcot at Vellore. At that stage an objection was taken saying that the Court was not competent to entertain appeals for the reason that the decree was for over Rs. 5,000 and that the appeal lay directly to the High Court and not to the District Court. The District Court after considering the decisions cited before it, upheld the contention and directed the memorandum of appeal for presentation to the proper Court. Thereafter an appeal was filed in this Court, After referring to section 13 of the Madras Civil Courts Act, Govinda Menon, J, as he then was, pointed out that section 42 of the Code of Civil Procedure should be considered to be a special provision and that this special provision would govern the case. When a decree passed by the High Court was transferred to the Court of the District Munsif for execution, it was held that an appeal from the order of the District Munsif in execution lay only to the District Court and not to the High Court even if the value of the subject-matter of the suit exceeded Rs. 5,000. In view of this decision, there is no substance in the objection of the respondent that the appeal to the Sub-Court was incompetent and that the present second appeal was, therefore, incompetent.

8. The learned counsel for the respondent relied on a decision of the Bench of this Court in *A. Venkataraman and another* v. *A. R. Srinivasa Sastrigal*[1] for saying that the forum of appeal is dependent on the valuation of the subject-matter and that the provisions of section 13 of the Madras Civil Courts Act would apply in such a case. I find that there was no discussion of section 42 of the Code of Civil Procedure in that decision.

1. (1975) T.L.N.J. 14.
2. I.L.R. (1956) Mad. 889: (1956) 1 M.L.J. 72: 68 L.W. 848: A.I.R. 1956 Mad. 390.

1. I.L.R. (1944) Mad. 378: (1943) 2 M.L.J. 352: 56 L.W. 514: A.I.R. 1944 Mad. 31.

As has been pointed out by Govinda Menon, J., section 42 is a special provision and therefore, it will override any general provision. I do not, therefore think that the decision in *A. Venkatarama Ayyar and another* v. *A.R. Srinivasa Sastrigal*[1] would apply to a case where section 42 of the Code of Civil Procedure is applicable.

9. The next question that has to be decided is whether the present petition under section 20 is competent at all. Both the Courts below have found that the appellant had no material to show that he was an agriculturist. As I have already observed, the learned counsel for the appellant drew my attention to the averment in the plaint that the appellant was not an agriculturist and that it had not been specifically denied in the written statement. I have looked into the plaint. In paragraph 5 relating to the cause of action, it is stated that the defendant was not an agriculturist. There is a general denial in the written statement in paragraph 8. The matter had not to go for trial, as there was a joint memo. filed by the parties on the basis of which a decree was passed. The respondent was content to take interest at 6 per cent. in spite of the fact that the contract was at the rate of 12 per cent. per annum. At that stage, it was quite possible that the defendant-appellant proceeded on the basis that his claim about his being agriculturist had not to be finally determined. Therefore the fact that there was an averment in the plaint about the defendant not being an agriculturist, which had not been specifically gone into at the time of the trial will not stand in the way of the defendant taking up the matter at the appropriate stage in execution. I therefore do not see any substance in the objection that the defendant not having denied the averment in the course of the trial should be taken as estopping him from putting forward the claim that he was an agriculturist at a later stage.

10. Based on the failure of the appellant to produce necessary materials even at the stage of the petition under section 20 of the Act, the submission for the respondent was that he had not discharged the burden to prove that he was eligible for the stay under section 20 and that therefore, he would have to take the consequences thereof. There are, of course, Bench decisions of this Court, which had taken the view that the burden is on the person claiming to be an agriculturist. The learned counsel for the appellant conceded this proposition, so that it is not necessary for me to consider the cited case in this behalf by the respondent. The only point that was made on behalf of the appellant was that he or his counsel had the necessary materials before them and that unfortunately the matter was not approached by the Courts below in such a manner as to allow them to place the materials before it at the appropriate stage. There appears to be some substance in this submission on behalf of the appellant. However, having regard to the fact that the position regarding his being an agriculturist having been put in issue right from the stage of the plaint, his failure to place necessary materials before the Court at any stage so far has to be taken into consideration and before enabling him to go on with the proceedings under section 20 of the Act, some condition has to be imposed. I think that in the interest of justice it is proper to direct him to deposit a sum of Rs. 10,000 into the executing Court within a period of four months from this date. Subject. to his doing so, the petition under section 20 of the Act will be considered on merits.

11. Subject to the above condition, the appeal is allowed. There will be no order as to costs. No leave.

S.J. ——— *Appeal allowed*

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1. I.L.R. (1944) Mad. 378: (1943) 2 M.L.J. 352: 56 L.W. 514: A.I.R. 1944 Mad. 31.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*S. Maharajan, J.*

The Registrar of Trade Unions, Union Territory of Pondicherry ... *Petitioner**

v.

The Government Press Employees' Union, represented by its Secretary V. Thirunavukarasu. ... *Respondent.*

Trade Unions Act (XVI of 1926), *sections* 2 (g) *and* 6—"*Industry*"—*Definition of—Government Press—Whether "Industry"—Government Press Employees' Union, if entitled to registration under section* 6.

The Government Press has been manufacturing, with the aid of the Printing Press, as well as by physical labour, and on a large scale, such articles as challans, gazettes, and calendars, budget papers etc. It would therefore undoubtedly be an "industry" within the meaning of the Trade Unions Act. [*Para.* 3.]

The Government Press Employees' Union is an association of workmen employed in an "industry", no matter whether it is an industry conducted by the Government or by the private sector and is therefore entitled to registration under section 6 of the Act. The workmen employed in an industrial undertaking, like the Government Press, Pondicherry, are workmen entitled to the benefits of the Trade Unions Act, 1926. [*Paras.* 4, 6.]

Cases referred to:—

The Tamil Nadu Non-Gazetted Government Officers' Union, Madras v. *The Registrar of Trade Unions, Madras*, I.L.R. (1962) Mad. 605: 75 L.W. 167: A.I.R. 1962 Mad. 234; *State of Bombay* v. *Hospital Mazdoor Sabha*, 1960 S.C.J. 679: (1960) 2 S.C.R. 866: A.I.R. 1960 S.C. 610; *Registrar of Trade Unions, West Bengal* v. *Mihir Kumar Gooha*, A.I.R. 1963 Cal. 56.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the District Court (Principal District Judge, Pondicherry, dated 28th March 1972, and made in C.M.A No. 45 of 1971 (Order No. 4341 of 1971,—Lab., dated 1st July, 1971, of the Registrar of Trade Unions, Pondicherry).

The Government Pleader for Pondicherry, for Petitioner.

K. Kumaraswami, P. Kannan and *H.N. Markandan*, for Respondent.

The Court delivered the following

JUDGMENT :—This Civil Revision Petition is directed against the judgment of the Principal District Judge of Pondicherry, which was rendered under the following circumstances.

1. The Employees of the Pondicherry Government Press constituted themselves into the Government Press Employees' Union and under section 5 of the Trade Unions Act, applied to the Registrar of Trade Unions, Pondicherry, for registration of the trade union. The Commissioner of Labour, Pondicherry, who happens to be also the Registrar of Trade Unions, sent a communication to the Secretary of the Government Press Employees' Union on 1st July, 1971, regretting his inability to register the trade union under the Trade Unions Act, 1962. The ground given by the Registrar for refusing to register the application was, "the present functions of the Government Press, Pondicherry, do not come within the meaning of trade or business". Aggrieved by this order, the Secretary of the Government Press Employees' Trade Union filed an appeal with the District Judge, Pondicherry, in C.M.A. No. 45 of 1971, impugning the order of the Registrar. It was argued before the learned District Judge that the Government Press had been printing challans, gazettes and calendars, which were being sold to the public for a price and that the Government Press was also printing budget papers and papers for the various Departments of the Government thereby rendering service either to the public at large or to a section of the public. This description of the functions of the Government Press, Pondicherry, was not disputed by the counsel appearing for the Registrar of Trade Unions. But, it was contended on the basis of certain decisions, that the employees in the Government Press, being

*C.R.P. No. 2333 of 1972 (P). 29th *January*, 197

Government servants, were disentitled to form a trade union and therefore, their association was ineligibfe for registration under the Trade Unions Act. The learned District Judge, upon a consideration of the provisions of the Trade Unions Act, came to the conclusion, having regard to the nature of the activities of the Government Press, that it partook of the character of business and industry and that the workers employed in this industry were entitled to have their union registered under the Trade Unions Act, 1926. Consequently, the learned District Judge set aside the order of the Registrar of Trade Unions and allowed the appeal with costs. It is against this judgment that the Registrar of Trade Unions, Pondicherry, has preferred this petition. The Trade Unions Act, 1926, as can be gathered from the preamble thereto, was intended to provide for the registration of trade unions and in certain respects, to define the law relating to registered trade unions. Under the Pondicherry Laws Regulation, 1963, this Act was extended to Pondicherry with effect from 1st October, 1963. Clause (*h*) of section 2 of the Trade Unions Act, defines a trade union to mean, "any combination, whether temporary or permanent, formed primarily for the purpose of regulating the relations between workmen and employers or between workman and workman, or between employers and employers, or for imposing restrictive conditions on the conduct of any trade or business, and includes any federation of two or more Trade Unions". The term "workman" employed in clause (*h*) has been defined in this latter part of the earlier clause (*g*) of section 2. Clause (*g*) runs as follows :

> " 'Trade dispute' means any dispute between employers and workmen or between workman and workman, or between employers and employmers which is connected with the employment or non-employment, or the terms of employment or the conditions of labour, of any person, and 'workmen' means all persons employed in trade or industry whether or not in the employment of the employer with whom the trade dispute arises."

The question arises whether the workmen represented by the Government Press Employees' Union, Pondicherry, are persons employed in "trade" or "industry". If they are are so employed, there can be no difficulty in holding that their trade union shall be entitled to registration under the Trade Unions Act, 1926. It is contended on behalf of the appellant that the Government Press, Pondicherry, cannot be legitimately, regarded as indulging in trade because, it is being conducted without any profit motive. It is true that when the Government Press prints budget papers and papers for the various departments of the Government, it does so without any profit motive. But, in view of the admission that the Government Press has also been printing challans, gazettes, and calendars and has been selling the same to the public for a price it is difficult to eliminate altogether the profit motive from this enterprise of the Government. Even assuming that the Government Press is not a trading venture, the more important question that would arise is whether it is not an "industry within" the meaning of clause (*g*) of section 2 of the Act.

5 Learned counsel for the respondent would invoke the definition of the word 'industry' contained in clause (*g*) of section 2 of the Industrial Disputes Act and ask me to give the same meaning to the word 'industry' used in clause (*g*) of section 2 of the Trade Unions Act. The Trade Unions Act was passed in 1926 and I think it rather artificial and unrealistic to give to the word used in an Act of 1926 the extremely wide-ranging meaning, which Parliament has chosen to assign to the word 'industry' in the Industrial Disputes Act, which was passed 21 years later in 1947. No doubt, in section 2 (*j*) of the Industrial Disputes Act, 'industry' has been defined to mean: "any business, trade, undertaking, manufacture, or calling of employers and includes any calling, service, employment, handicraft, or industrial occupation or avocation of workmen." But then, this sweeping definition does not seem to me in accordance with the Dictionary meaning of the word 'industry'. This is a definition which it was open to Parliament to adopt for the specific purposes of the Industrial Disputes Act. I think it, therefore, wrong to interpret the word 'industry' used in the Act

of 1926 in the light of the widely extended meaning given to it by a statute of 1947. What, then does the word 'industry' under the Act of 1926 connote? According to the Concise Oxford Dictionary, 'industry' means:

(1) diligence; (2) habitual employment in useful work; (3) branch of trade or manufacture'. 'Manufacture' according to the same dictionary, means: 'making of articles by physical labour or machinery especially on a large scale; branch of such industry, as woollen, etc.' It would be clear from this dictionary meaning of the words, 'industry' and manufacture', that no profit motive is necessarily involved in an industry. There can be little doubt that the Government Press has been manufacturing, with the aid of the printing press, as well as by physical labour, and on a large scale, such articles as challans, gazettes, and calendars, budget papers, etc. It would, therefore, undoubtedly, be an 'industry' within the meaning of the Trade Unions Act, and the respondents, being persons employed in such an industry, must be, rightly, regarded as 'workmen' within the meaning of the Act. Any combination formed primarily for the purpose of regulating the relations between these workmen and their employers world, then, be a trade union within the meaning of clause (*h*) of section 2 of the Act. Learned counsel for the appellant would, however, contend that the workmen in the employ of the Government Press, Pondicherry, being Government servants, their trade union is disentitled to registration under the Trade Unions Act. I have scrutinized, in vain, the various provisions of the Act to discover whether workmen employed under the Government have been expressly or by necessary implication, put out of the pale of the Trade Unions Act. We are familiar with a number of special enactments which make it clear that they would have no application to Government concerns. No such provision has been made in the Trade Unions Act. On the contrary, an amendment made by Parliament in 1947 would serve to emphasize the legislative intention to bring even an industry run by the Govern ment within the ambit of the Trade Unions Act, 1926. I refer to Central Act XLV of 1947 called the Indian Trade Unions Amendment Act, 1947, which received the assent of the Governor-General on 20th December, 1947. In section 3, clause (*b*), sub-clause (*b*) of the Amending Act, the word 'employer' has been defined to mean.... "in relation to the industry carried on by or under the authority of any department of the Central Government or a Provincial Government the authority prescribed in this behalf or where no authority is prescribed the head of the department". This amendment reflects the undoubted intention of Parliament to bring an industry carried on by or under the authority of the Central Government or Provincial Government within the province of the Trade Unions Act, 1926. Learned counsel for the appellant contends that the Amendment Act of 1947 would come into force only on such date as the Central Government may by notification in the Official Gazette appoint and inasmuch as the Central Government has not since 1947 made any notification in this behalf, the Court ought not to have any regard for the provisions contained in the Amendment Act while construing the Trade Unions Act, 1926. I am unable to agree. It may be that several new provisions contained in the Amending Act, have not come into force because the Central Government has not chosen to appoint a date by notification. But the Court cannot close its eyes to the fact that Parliament has expressed, unambiguously, its intention by enacting Act XLV of 1947 and making it clear, in its definition of 'employer', that even an industry run by the Government is subject to the provisions of the Trade Unions Act. As I have alredy pointed out, even without invoking Act XLV of 1947, the only reasonable construction to put upon the several provisions of the Trade Unions Act, 1926, is that all workmen employed in any trade or industry, regardless of the fact whether the trade or industry is being conducted by a Government or by a private agency, are entitled to combine themselves into a trade union and to get their trade union registered under section 6 of the Act This conclusion, which can be independently arrived at, is reinforced by the amending Act of 1947.

4. Reference is next made to a ruling of a Division Bench of this High Court con-

sisting of Ananthanarayanan, J. (as he then was) and Venkatadri, J., in *The Tamil Nadu Non-Gazetted Government Officers' Union, Madras* v. *The Registrar of Trade Unions, Madras*[1]. As both learned counsel would appear to rely upon this ruling in support of their contradictary positions, it is necessary to set forth in some detail, the facts of that case and the proposition of law laid down in that case by their Lordships. The Tamil Nadu Non-Gazetted Government Officers' Union, which included among its members Sub-Magistrates of the Judiciary, Tahsildars entrusted with the powers of enforcement of the tax machinery and officers in charge of treasuries and sub-treasuries applied to the Registrar of Trade Unions, Madras, for registration of their union as a trade union under section 5 of the Trade Unions Act. The Registrar, in that case rejected their application after holding that the association of ministerial employees of the Administrative department or office of the Government Press, Madras, could not claim to be a trade union, at all, and was not eligible for registration under the Act. Against the order declining registration, the Tamilnadu Non-Gazetted Government Officers' Union preferred an appeal under section 11 of the Act and this was registered as an Original Petition and heard by Ramachandra Iyer, J. (as he then was). The learned Judge dismissed the appeal and against his judgment, an appeal was preferred to the Division Bench. Their Lordships referred to the fact that the Supreme Court had approved of the dictum that those activities of the Government which should be properly described as "regal or sovereign activity" were outside the scope of "industry" because those are functions which a constitutional Government can and must undertake for governance and which no private citizen can undertake, *State of Bombay* v. *Hospital Mazdoor Sabha*[2], These functions were primary and inalienable functions of a constitutional Government. Examples of such functions are the legislative function, the administration of laws and the exercise of judicial power. In these circumstances, the Supreme Court declared :

> "It could not have been, therefore, in the contemplation of the Legislature to bring in the regal functions of the State within the definition of 'industry', and thus confer jurisdiction on Industrial Courts to decide disputes in respect thereof".

It was in this light that the Division Bench examined the character of the members of the Tamil Nadu Non-Gazetted Government Officers' Union, which purported to include among its members Sub-Magistrates, Tahsildars, Officers in charge of Treasuries, Officers of Civil Court establishments and all the Heads of Department of the Government. These were all officers who were civil servants engaged in performing the sovereign and regal functions of the Government, which are Government's inalienable functions. They could not, therefore, be included within the "definition of workmen" in an "industry". to whom either section 2 (*g*) or (*h*) of the Trade Unions Act could properly apply. It was pointed out before the Division Bench, that the Non-Gazetted Government Officers' Union included also members of the State Transport Organisation, Cinchona factory of Government, etc., who could well be regarded as persons working as "workmen" in an "industry" since they were specific industrial undertakings of Government not partaking of the character of the Government's sovereign and real functions. The Division Bench without rejecting this part of the argument, held that inasmuch as the Tamilnadu Non-Gazetted Government Officers' Union had a wide and unqualified basis and included Sub-Magistrates, Tahsildars, Treasury Officers, etc., it could not claim to consist exclusively of workmen in an industry. In arriving at this decision the Divison Bench expressly held as follows :

> "We consider that the appellant union is not entitled to succeed, at least with reference to the members of the civil service who form part of the essential and regal administrative machinery of the Government".

1. I.L.R. (1962) Mad. 605 : 75 L.W. 167: A.I.R. 1962 Mad. 234.
2. 1960 S.C.J. 679 at 685: (1960) 2 S.C.R. 866: A.I.R. 1960 S.C. 610.

So far as the members of the Tamil Nadu Non-Gazetted Government Officers' Union, who were employees of industries conducted by the Government were concerned, the Division Bench expressly left the question open after making the following observation:

> "It is not necessary for us to express any view whether in the event of the employees of these branches of Government which do partake of the character of 'industry' organising themselves into an Association of this kind, they would be eligible for registration as a Trade Union or otherwise."

It appears that, in that case, the learned Advocate-General conceded that there are three categories to be regarded, the middle of which shares the characteristics of the other two and hence debatable in its scope. In the first category was the core of the civil services integrated with the inalienable and regal functions of the Government. They could, certainly, not be regarded as 'workmen' within the meaning of the Act. In the third category were those independent Corporations which are quasi-Government agencies or subsidized undertakings which are purely industrial in character such as Machine Tools Factory, Insurance Corporation, etc. The Division Bench held that there was little doubt that these are industrial undertakings whose employees are workmen at least as defined in the Industrial Disputes Act, 1947 and it would be difficult to say that such workmen could not form trade unions for the conduct of industrial disputes. The intermediate category was, according to the learned Advocate-General, a kind of penumbra where light and shadow are mixed and here, according to the Division Bench, differences of view were, certainly, possible. Certain welfare, educational, or ameliorative departments of Government, according to the Division Bench, might or might not be regarded as liable to exclusion: the employees in those departments might or might not be regarded as 'workmen' in an 'industry'. But, in the intermediate category, there could also be persons who are workmen in an industry conducted by the Government and the definitions in section 2 (*g*) and (*h*) could obviously, apply to them.

From a scrutiny of the Division Bench judgment, two things become clear:

(1) that the Division Bench, deliberately, refused to decide whether the workmen in an industry conducted by the Government would be governed by the Trade Unions Act, 1926, and

(2) if workmen in a Government undertaking like the Government Press of Pondicherry, had exclusively and without joining hands with the civil service exercising sovereign and regal functions, formed an Association, the Division Bench would have regarded them as 'workmen' within the meaning of the Trade Unions Act entitled to have their Trade Union registered under section 6 of the Act. It is, therefore, wrong for learned counsel for the appellant to contend that there is anything in the ruling cited *supra* which constrains this Court to hold that the workmen of the Government Press are outside the ambit of the Trade Unions Act, merely because they also happen to be Government servants. For the reasons which I have already stated, I have little hesitation in holding that the respondent (Government Press Employees' Union) is an Association of workmen employed in an "industry", no matter whether it is an industry conducted by the Government or by the private sector and is, therefore, entitled to registration under section 6 of the Act.

5 Learned counsel for the respondent placed strong reliance upon a Division Bench ruling of the Calcutta High Court in *Registrar of Trade Unions, West Bengal* v. *Mihir Kumar Gooha*[1]. That was a case where the employees of the State Insurance Corporation resolved to form a trade union of their own and the Registrar of Trade Unions rejected their application for registration under the Indian Trade Unions Act, 1926. The matter came up before the Calcutta High Court and the Division Bench held that the Employees' State Insurance Corporation carried on a "trade" or "industry" and the employees thereof were "workmen" as defined in clause (*g*) of section 2 of the said Act.

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1. A.I.R. 1963 Cal. 56.

In support of this proposition, the learned Judges gave their reasons as follows (at page 58):

"It will be observed that in the definition of the expression 'trade dispute', the words 'trade' and 'industry' occur. 'Workmen' according to this definition, mean all persons employed in a trade or industry. In the definition of the expression 'trade union', the words 'trade' and business appear. It follows that there may be 'trade union' within the meaning of the said Act, not only in connection with a 'trade' or 'industry' but also with a 'business'."

Again, their Lordships, have observed at page 59, as follows:

"It is obvious that the words 'trade', 'industry' and 'business' have been used indiscriminately and are all within the scope of the Act, which was intended to be wide in scope. The argument put forward on behalf of the respondent is that the expression 'workmen' in section 2(*g*) relates to 'trade' or 'industry', whereas the Employees' State Insurance Corporation is neither a 'trade' nor an industry........"

6. I am afraid, with great respect to the learned Judges, it is not permissible to invoke the subordinate clause in the definition of 'trade union' and use the phrase 'trade or business' employed in that subordinate clause for the purpose of expanding the meaning of 'workmen' defined in clause (*g*) of section 2. The word 'business' employed in clause (*h*) of section 3 has to be understood in a restricted sense with reference to the company of words in which it occurs. As the Division Bench of our High Court has pointed out, if the extended meaning given by the Calcutta High Court were to be adopted, even Government servants exercising sovereign and real functions like Sub-Magistrates would have to be regarded as 'workmen' falling within the mischief of the Trade Unions Act, in which case, it would militate against the ruling of the Supreme Court that it could not have been in the contemplation of the Legislature to bring in regal functions of the State within the definition of 'industry' and thus confer jurisdiction on indutrial Courts to decide disputes in respect thereof. Therefore, I refuse to adopt the extended meaning given by the Calcutta High Court. I am clear, in my mind, that the workmen employed in an industrial undertaking, like the Government Press, Pondicherry, are "workmen" entitled to the benefits of the Trade Unions Act of 1926. Consequently, I confirm the judgment of the Court below and dismiss this petition with costs.

Advocate's fee fixed at Rs. 250.

R.S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*T. Ramoprasada Rao and S. Ratnavel Pandian, JJ.*

V. Krishnappa Naidu .. *Appellant**

v.

The Union of India, owning the Southern Railway by its General Manager .. *Respondent.*

(A) *Torts—Negligence—Manned level-crossing—Accident—What constitutes warning of approaching train.*

(B) *Railways Act (IX of* 1890), *sections* 13 *and* 47—*Rules* 227 *to* 235 *under Chapter VIII (Rules for the guidance of railway servants)—Railways Act, section* 124—*Manned level-crossing —Warning lights lit and gongs sounded in warning—Taxi—Attempting to cross the level-crossing—Train dashing against the taxi at the level-crossing—Negligence of taxi driver—Owner of vehicle not entitled to damages against the railways.*

The act of the gateman at a Railway level crossing closing the gates is a step taken by the railway after the warnings already given to the passengers on the road. It is not a warning, because by such an act the road-users are actually prevented from crossing. At level crossing where red-lights and sounding of gongs are provided, they constitute the actual warnings to the public not to cross the track because of the approaching of the train. The closing of the gates is an additional precaution, an additional preventive step, provided by the Railway Administration against the road-users who in spite of the red-lights and the sounding of the gongs, may choose to enter the railway track. Red-light signals on the highways are given as a danger signal not to proceed further. These signals are intended and also understood by the public at large as a warning not to proceed further. Likewise, at railway level crossings also these lights and gongs are provided to warn and alert the public sufficiently in advance not to proceed further. The closing of the gates is an additional precaution provided in section 13 of the Railways Act and rules 227 to 235 (under Chapter VIII) coming under Part I (Rules for the guidance of railway servants) of the General Rules framed under section 47 of the Railways Act, which came into force from the 15th May, 1930. Section 124 of the Indian Railways Act is a penal section providing for the punishment of persons who, knowing or having reason to believe that an engine or train is approaching along the railway, open any gate set up on either side of the railway across a road or pass or attempt to pass or drive or take or attempt to drive or take any animal, vehicle or other things across the railway. Thus, even if a person *knows or has reason to believe that an engine or train is approaching along the railway*, he is prevented from crossing or attempting to cross the railway line. Therefore, mere knowledge or a reasonable belief about the approaching of any train or engine is a sufficient warning to the public not to cross the level crossing. No other warning is actually necessary. [*Para.* 10.]

On facts, *Held* that the driver of the taxi in the instant case committed an act of trespass into the railway track and the accident was not caused due to any negligence on the part of the Railway Administration or its staff. But, on the other hand, it could not be averted inspite of the best efforts taken by the Railway Administration and so, the owner of the taxi had no cause of action against the Railway Administration. [*Para.* 18]

Cases referred to:—

Robert Addie and Sons (Collieries) Ltd. v. *Dumbreck*, (1929) A.C. 358 ; *Videan and another* v. *British Transport Commission*, (1963) 2 Q.B. 650 ; *Hillen and Pettigrew* v. *I.C.I. (Alkali) Ltd.*, (1935) All E.R. 555: (1936) A.C. 65: *Commissioner for Railways* v. *Francis John Quinlain*, (1964) A.C. 1054 (P.C.) : (1964) 1 All E.R. (P.C.) 897 ; *Latham* v. *R. Johnson and Nephew Ltd.* (1913) 1 K.B. 398 : 29 T.L.R. 124 C A.; *Southern Port and Cement Ltd.* v. *Rodney John Cooper*, (1974) 2 W.L.R. 152.

Appeal against the decree of the Principal Judge, City Civil Court, Madras in Original Suit No 4908 of 1968.

K. Ramaswami, for Appellant.

P. S. Srisailam, for Respondent.

*Appeal No. 832 of 1975. 17*th January*, 1975.

The Judgment of the Court was delivered by

Ratnavel Pandian J.—The unsuccessful plaintiff in O.S. No. 4908 of 1968 on the file of the City Civil Court, Madras is the appellant herein. The appellant filed a suit for the recovery of a sum of Rs. 25,720.34 as damages in respect of an accident that occurred on 16th August, 1962 at about 7 P.M. The relevant facts that led to the action can be stated thus : The plaintiff is the real owner of a Baby taxi, Standard X, bearing Registration No. M.D.C. 9261 of the model of 1956. But the registration certificate stands in the name of his son V.K. Bhaktavatsalam. On 16th August, 1962, the defendant Railway's train *viz.*, the Tirunelveli Express left Madras Egmore Railway Station at about 6-45 P.M. and while proceeding to Tirunelveli, crashed against the said Baby taxi at the level crossing between Kodambakkam and Mambalam Railway Stations. The said level crossing was situated immediately north of Mambalam Railway Station and it is referred to as Doraiswami Iyer level crossing. It is so called by this name since Doraiswami Iyer Street in T'Nagar is just east of the said level crossing. The area to the west of this crossing is called old Mambalam. It is the case of the plaintiff that the driver of the taxi *viz.*, P.W. 3 drove the vehicle across the level-crossing as the gates were open. While the rear portion of the taxi had not crossed the steam-line, the Tirunelveli Express, without any warning, came from Egmore side and dashed against the taxi. As a result of this impact, the two passengers and the driver were injured and the taxi was severely damaged. According to the plaintiff, the accident was entirely due to the gross negligence of the defendant Railway Administration and their staff, for the reasons that there was no automatic signal system and no interlocking arrangement for closing the gates sufficiently early before the train was at sight. The Railway gate was wide open and there was no signal or any other alarm at or near the gate to put the driver on guard. It is thus alleged that there was an open invitation as it were for the plaintiff's car to pass through the level-crossing. The plaintiff has valued the damage to the vehicle at Rs. 7,720-34 and a sum of Rs. 18,000 is claimed as the loss of income at the rate of Rs. 30 per day from 17th August, 1962 to 10th April, 1964. The said taxi was held up in the office of the Police Commissioner in connection with an inquiry into this accident and the plaintiff took delivery of the same only on 2nd September, 1963, since the plaintiff had been awaiting inspection by the officials of the defendant.

2. The defendant railway resisted the claim contending as follows : The plaintiff is not the registered owner of the vehicle. There is no question of negligence on the part of the defendant as alleged. The taxi driver (P.W. 3), in spite of necessary warnings, entered the level crossing in spite of the road danger signal exhibited at the gate and ignoring the continuous sounding of the gong and the shouting of the gateman who was trying to close the gate, warning of the approaching train. The level-crossing is manned level-crossing and on the approaching of a train from either direction, the warning lights are lit and the gongs sound warning the road-traffic about the impending close of the gates. In this case, P.W. 3 entered the level-crossing in spite of the warning. It is futile for the plaintiff to contend that there was an open invitation as it were for the taxi to pass through. Thus, it is submitted by the defendant that since the accident was caused solely because of the rashness and negligence on the part of the driver of the taxi, the defendant is not responsible for the accident or for any alleged damage, which the plaintiff claims to have suffered thereby. The plaintiff's claim of Rs. 7,720 towards the repair of the vehicle is also not admitted. Further, the plaintiff is not entitled to claim any damages towards loss of income and the suit is also barred by limitation.

3. On the above pleadings, the following issues were set for trial :

1. Is the suit not maintainable for the reasons stated in paragraph 3 of the written statement ?

2. Did the defendant observe all that was required of them to warn the traffic passing across the line at the time of the accident?

3. Was the plaintiff's driver rash and negligent in entering the level-crossing as claimed in paragraph 9 of the written statement?

4. If issue 2 is found in the negative, what is the amount of damages due to the plaintiff ?

5. Is the Union of India, in any event, liable for the tortious acts of its servants?

6. Is the suit barred by limitation ?

7. To what relief is the plaintiff entitled?

4. The plaintiff examined four witnesses including himself and marked Exhibits A-1 to A-10. The defendant relied on the evidence of D.Ws. 1 to 3 and marked Exhibits B-1 to B-28. The learned Principal Judge of the City Civil Court, after elaborately discussing the evidence, has found on issue 1 that the suit is maintainable and on the main issues 2 and 3 that the accident was not as a result of any negligence on the part of the Railway servants, but was entirely due to the rashness on the part of the taxi driver (P.W. 3). On issue 4 the learned trial Judge estimated the damages suffered by the plaintiff at Rs. 5,800 (Rs. 4,000 for the damage to the vehicle and Rs. 1,800 towards the loss of income). Since issues 5 and 6 were not pressed by the defendant, no finding was given on those issues. Ultimately the trial Court dismissed the suit without costs. It is as against this dismissal of the suit, this appeal has been filed.

5. Before going to a discussion of the relevant questions of law on the disputed facts of the case, the following undisputed facts may be summarised for a proper understanding and appraisal of the evidence. The occurrence took place on 16th August, 1962 at about 7 P.M. at a level-crossing known as Doraiswami Iyer Street level-crossing (hereinafter referred to as the level-crossing) which ran across the respondent's railway track at a point between Kodambakkam and Mambalam Railway Stations. The particular level-crossing runs east to west, south to Kodambakkam and north to Mambalam, and on either side of the crossing there were gates made up of two leaves as on the date of occurrence, opening outwards, away from the track. The gate on the east gave access to Doraiswami Iyer Street in T.'Nagar as said earlier, and on the west of it lay West Mambalam, otherwise known as Old Mambalam. There were gongs and road-light signals facing outwards from the point of crossing on either side. The gates were provided with padlocks and it is the duty of the gonger responsible for that section of the Railway line to ensure that the gates are kept closed and secured except when actually in use. It is the public crossing over the line for carriages and foot-passengers. There are three railway lines running over the level-crossing as indicated in Exhibit B-5 *viz.*, the main line on the eastern-most side, the down-line in the centre and the up-line on the western-most side, out of which the two lines on the western side *viz.*, the up and down lines are used for the up and down electric trains and the eastern-most main line is used for the steam engine trains. On the evening in question, an electric train bearing No. 139 broke down at the Nungambakkam Railway Station, rendering one of the tracks of the electric trains non-commissioned. So, all the electric trains bound for the up and down journeys had to use only one line, which, as a result, necessitated the closing of the gates at the level crossing for a considerable length of time running from 6-00 P. M. to 6-45 P. M. Only at 6-45 P. M. the ringing of the warning gong stopped and the road-light signal went off, indicating that the gates at the level-crossing would be opened for traffic. Accordingly D. W. 2 and the other gateman *viz.*, Govindan (not examined since retired) opened the gates. As pointed out, since the gates were closed for 45 minutes, a large number of vehicles had collected on either side of the level-crossing. As soon as the gates were opened, a trail of vehicles rushed through the crossing. It is the defendant's case that within a few minutes of the opening of the gates the warning gong began to ring again and the red-lights were glown indicating, that some train was approaching, that the gates should be closed But the plaintiff disputes this fact and contends that he did not hear any caution of the bells ringing or see any red-light at the gate warning not to proceed. About this controversy, we shall discuss later.

6. The taxi concerned in the case had been stationed about 250 yards east of the level-crossing on that road on the T.'Nagar side. Two young boys (the

passengers in the taxi, who were injured but not examined) had engaged the taxi for being taken to old Mambalam from where some passengers had to be taken to the Madras Central Station. P. W. 3 was the taxi driver. After taking the two boys in the taxi, P. W. 3, the taxi driver, proceeded towards old Mambalam and on seeing the gate at the level-crossing closed, joined the queue of vehicles already waiting on the eastern side to cross the level-crossing to go to old Mambalam on the west. After the gates were opened, P. W. 3 followed the vehicles ahead of him and entered the level-crossing at which point of time the steam-Tirunelveli Express came on the steam-line and struck the rear portion of the taxi as a result of which the taxi, with the driver (P. W. 3) and the two young boys, was flung out on to the side of the main line, *i.e.*, between the main line and the down line as shown in Exhibit B-5. The train moved further and stopped. By the time the engine driver (D. W. 3) could come up to the place of accident after bringing the train to a halt, the injured *viz.*, P. W. 3 and the two boys had been taken away from the place to the hospital.

7. Now, we shall refer to the other pieces of evidence adduced by both sides in the case. The appellant had examined, as we have already said, four witnesses including himself. P. Ws. 1 and 2 speak only with reference to their ownership of the damaged vehicle. P.W. 4, working as a mechanic in Vasu Automobiles, speaks about the damage to the taxi and the approximate cost of repairs which, according to him, would exceed Rs. 7,000. So the evidence of these three witnesses is not of any value for the determination of the main issue as to how the accident had happened and as to who was really negligent. So, the entire case of the plaintiff, for the determination of the main issue, rests only on the evidence of P. W. 3. P. W. 3 says that he, having been engaged by the two young boys to go to old Mambalam on the western side, proceeded towards old Mambalam. He found the gate at the level crossing closed and a number of vehicles waiting. Within five minutes of his arrival at the gate, the gates were opened and the vehicles were allowed to cross the level-crossing from either side. He drove his vehicle behind other vehicles towards west. When his vehicle was on the western-most railway track, he heard people shouting "வண்டி வருது, வண்டி வருது" ("train coming, train coming"). Within two or three seconds of the hearing of the shouts, he heard a heavy noise of impact, which occurred on the rear wheel of his vehicle on the eastern-most railway track *viz.*, the main steamline. As the vehicle had been thrown, he became unconscious and he does not speak as to what happened afterwards. It is the evidence of P. W. 3 touching the point at issue that the gate was not closed after it was opened and before the impact occurred and he did not hear any caution bell ringing or see any red-light at the gate warning not to proceed. Even during the chief-examination he has marked Exhibit B-11, the statement given by him to the railway authorities, admitted its correctness.

8. Coming to the evidence of D. Ws. 1 to 3, the evidence of D. W. 1 the Station Master, is to the effect that there was no failure in the electric system suggesting that warning signals were functioning properly at the points of the level-crossing, D. W. 2, the gateman at the western gate, speaks first of all about the general rule that when the train leaves the station the bells at the gate would ring and the red-lights facing the roads on either side would be burnt and on such warnings, the gatemen would close the gates on either side. Coming to the accident, he states that the gates were closed at 6 P. M. for passing trains, continuously for 45 minutes and vehicles in large numbers had collected in Doraiswami Iyer Road on the eastern side as well as the old Mambalam side. At about 6-45 P. M. there was clearance for opening the gates and so they opened the gates and allowed the vehicles to pass through. But, within a few minutes, bells began ringing and the red-lights were lit. Govindan (since retired as pointed out supra), who was working on the Doraiswamy Iyer Road side, and himself on the other side, closed one leaf of their respective gates. Govindan was attempting to close the other leaf of the eastern gate. But, before he could

so, the vehicle in question rushed into the track through the space at the other leaf of the eastern gate which was still open. In the meanwhile, the train on the steam-line was approaching. On seeing the train approaching, himself and Govindan cried out that the train was approaching. The witness would further swear that on seeing this he showed the signal to the driver of the train to stop; but the train could not be stopped. Within a few seconds, the train struck the vehicle. He asserts that the signals at the particular point began to function and speaks about the approach of the train and he is definite that on the particular day the gongs were ringing and the danger lights glowing. D. W. 3 was the engine-driver of the Tirunelveli Express which got involved in the accident. His evidence is that he left the Egmore Station at about 6-45 P. M. and after receiving the token at Kodambakkam (which means that the track was clear), proceeded further. He saw the green signal at Kodambakkam and the train was speeding up at the rate of 30 miles per hour. The next halt of the train was at Mambalam Station. While approaching the level-crossing at which point the accident has occurred, he observed a car crossing at the track. On seeing that, he applied the brakes. But, the said car passed and cleared the track. But, another Baby taxi (suit taxi) followed the previous one and attempted to cross the track. But, before the train came to a halt as he had already applied the brakes, there was an impact between the engine and the rear of the taxi. But, he would add that he did not see any signal to stop the train and there was no other vehicle coming behind the suit taxi. After the impact, he got down from the engine; but he could not find the taxi driver there; probably, even before the arrival of the engine driver, the injured occupants of the car had been removed to the hospital. In cross-examination, it is brought out that the train passed Kodambakkam at 6-56 P. M. and that the running time between Kodambakkam and Mambalam stations is 2 to 3 minutes. The search light of the engine was on. There is a curve in the track and so the gates of the level-crossing in question were visible only when the engine was about 30 yards north of it and not 200 yards as suggested. When his attention was drawn to a particular point as to whether the gates were closed or not, he would say that he was not able to see the gate leaves and so he could not say whether they were open or not. On that day, one Mr. Mayers was working as the first fireman in the engine and his duty was to keep an eye on the track. He applied the brakes while the train was 30 yards north of the gate and after the impact the train moved for about 100 yards and finally came to a halt. Even if the danger signal had been shown, he says that the train could not have been stopped before reaching the level-crossing. Speaking about his ability and experience, he would say that he has been an engine driver for the past 24 years and has received awards for good service on three occasions.

9. The main contention of the learned counsel appearing for the appellant is that as the gateman failed to close the gates and as the gates remained open it was only an invitation as it were to the taxi driver (P. W. 3) to cross the line and that was why the suit taxi, following the other vehicles, entered into the railway track, which resulted in the accident, and therefore the accident was due to the gross negligence of the defendant Administration and its staff. A faint argument was also further advanced, on the strength of the pleadings in the plaint, that at or about the time of the accident there no was signal or any other alarm at or near the gate to put the appellant-plaintiff on guard. Further, he would emphatically urge that even assuming that there were the red signal and the ringing of the gong, they were warnings only to alert the gatemen to close the gates and would not amount to warnings to the public not to cross the level-crossing, and therefore, until the gates are closed, thereby preventing the traffic from entering into the track, one has got a right of entry. In other words, it is contended that keeping the gates open by itself is an invitation to the passengers to pass through and the liability of the Railway Administration for any accident that may occur ubsist till the gates are closed.

10. Coming on to the question as to whether the gongs were ringing and the red-lights were lit, P. W. 3 is not assertive that the gongs did not ring or that the red-lights did not glow. But, he would simply say that he did not hear any caution bell ringing or see any red-light at the gates warning not to proceed. In the chief-examination itself, as we have already mentioned in the course of the narration of the evidence, Exhibit B-11, the signed statement given by P. W. 3 to the Sub-Inspector of Police, Egmore, on 21st August, 1962, is marked. There is no evidence whether there was any criminal case registered in connection with this accident and whether this statement has been recorded during the course of the investigation. Anyway, without going into the question as to its admissibility in evidence, we feel that though the appellant has relied on it to support his case, in fact the major portion of the statement goes against him. We shall discuss this statement later in detail while dealing with the first question. At this particular juncture, we may mention that this document is relied upon by the appellant to show that even in Exhibit P-11, he has stated that he did not hear any bell-sound and did not see any red-light. As against the evidence of P. W. 3 it has been brought out in the cross-examination of D. W. 1 that there was no failure of electricity on the date of the accident. D. W. 2 is very emphatic in his evidence that within a few minutes after the gates were opened at 6.45 P. M. the bells began ringing and the red-lights were glowing, thereby indicating that the train was approaching. In spite of the warnings, the suit vehicle entered into the track. There is absolutely no cross-examination nor any suggestion that the bells did not ring and the red-lights did not glow. Exhibit B-7 the relevant sheets from the level-crossing register relating to the suit level-crossing and Exhibit B-8 the special report of the Permanent-way Inspector regarding the working of the level-crossing show that the two warnings are working electrically and that they warn the users of the road about the approaching of the train. In the absence of any tangible evidence controverting this aspect, we hold that the gongs were ringing and the red-lights at the gates were glowing at the time of the accident. It is admitted that electric red-lights are fixed on either side of the level-crossing. It is also pertinent to note that the lights are facing the roads on either side. That itself is an indication that when the red-lights are on, the people are warned not to cross the level-crossing. In addition to these red-lights, the gongs also sound. By no stretch of imagination can it be said that this sounding of the gongs, which lasts for some time at the time of the closing of the gates, is intended merely to the gatemen. It is well-known that all foot-passengers and other traffic intending to cross the level-crossing get alerted by the red-lights and the sounding of the gongs. It is absurd to say that P. W. 3 the taxi driver, could ignore the red-lights and the ringing of the gongs, saying that they are only an indication to the gatemen to close the gates and not to alert the public. In this connection, another point may also be noted. The question is what is the warning to the passengers intending to cross the level-crossing ? The act of the gatemen closing the gates is a step taken by them after the warnings already given to the passengers on the road. When the gates are being closed, it cannot be said that it is a warning, because by such an act the road-users are actually prevented from crossing. Thus, the position is that at level-crossings where the red-lights and the sounding of gongs are provided, they constitute the actual warnings to the public not to cross because of the approaching of the train. Then, the gatemen close the gates in order to physically prevent the road-users from entering into the track. Thus, the closing of the gates is an additional precaution, an additional preventive step, provided by the Railway Administration against the road-users who in spite of the red-lights and the sounding of the gongs, may choose to enter the railway track. In this connection, still another point can be noted. It is the primary and rudimentary principle that red-light signals on the highways are given as a danger signal not to proceed further. These signals are intended and also understood by the public at large as a warning not to proceed further. Likewise, at railway level-crossings also these lights and gongs are provided to warn and alert the public

sufficiently in advance not to proceed further. The closing of the gates is an additional step taken by the railways as provided in section 13 of the Railways Act and rules 227 to 235 (under Chapter VIII) coming under Part I (Rules for the Guidance of Railway Servants of the General Rules framed under section 47 of the Railways Act, which came into force from the 15th May, 1930. Section 124 of the Indian Railways Act is a penal section providing for the punishment of persons who knowing or having reason to believe that an engine or train is approaching along the railway open any gate set up on either side of the railway across a road or pass or attempt to pass or drive or take or attempt to drive or take any animal, vehicle or other thing across the railway. Thus, even if a person *knows or has reason to believe that an engine or train is approaching along the railway* he is prevented from crossing or attempting to cross the railway line. Therefore, mere knowledge or a reasonable belief about the approaching of any train or engine is a sufficient warning to the public not to cross the level-crossing. No other warning is actually necessary. But in this case, we have got ample evidence to show that red-lights and gongs were fixed at the gates of the level-crossing as shown in the plan Exhibit B-5. We also find from the judgment of the lower Court that the learned counsel for the plaintiff did not contend that the aforesaid warnings were not there. On the other hand there is evidence to show that in spite of the red-light (danger) signal sounding of the gongs, the attempt of the gateman to close the gate and his actually closing one of the leaves as referred to above and the admitted loud shouting by the gateman that the train was coming, the taxi driver P. W. 3 had chosen to cross the level-crossing. The abovesaid warnings had no effect on him. We, therefore, hold that in this case the sounding of the gongs and the glowing of the danger signals at the gates facing the roads on either side are by themselves sufficient warnings to the road-traffic not to cross the level-crossing and the closure of the gates was only an additional precaution physically preventing any trespass by the road-users into the railway track. As regards level-crossings where there are no such red-lights or gongs or any other additional warnings provided. Rule 229 of the General Rules of the Railways framed under section 47 of the Act and the other rules and instructions issued under the Act should be referred. So far as this case is concerned, the argument advanced by the learned counsel for the appellant on this aspect is not acceptable.

11. Coming to the other question as to whether one of the leaves of the eastern gate was closed by the gateman and whether he attempted to close the other one also, P. W. 3 would state that the gate was not closed after it was opened before the impact occurred. But, D. W. 3 swears that they (gatemen) closed one of the leaves of the gates on either side and before the gateman or the eastern side could close the other leaf, the suit taxi rushed in in spite of the warnings. In Exhibit B-11, P. W. 3 himself has admitted that the gateman tried his best to close the gates, though in another place he would state that when he entered, both the gates were in an open condition. Whatever, it may be, he has categorically admitted that four or five minutes after the gate was opened, the gateman was shouting loudly about the coming of No. 119 Express (the Tirunelveli Express) and that the train was 250 yards away. His vehicle was jammed and correctly on the track and there was only a gap of 1½ ft. between his taxi and the car which it followed. He turned to the left and got into a depression and the dicky in the rear portion of the taxi was on the railway line, infringing the line, and so he was unable to move. He was continuously looking at the approaching train. Meanwhile, the train came and hit at his taxi. In another place, he admits that the gateman was shouting loudly about the approaching of the train and asking he traffic to clear away. Coming to his evidence in Court, he has stated :

> " When my vehicle was on the eastern-most railway track, I heard people shouting "........" and within two or three seconds of that noise, I heard a heavy noise of impact."

Thus, it is very clear that P. W. 3 was warned by the gateman. The question

is, when. Two important points have to be noted in this connection. As we have already pointed out, he has stated in Exhibit B-11 that the gateman tried his best to close the gate. From the way in which he has narrated the incident, it is clear that he refers only to the eastern gateman. If he had already crossed the gate and entered the track and was proceeding towards west, he could not have seen the eastern gateman closing the gate behind him. So, the only possibility is that before he entered the level-crossing, he should have already seen the gateman trying his best to close the gate. If the gateman had really tried to close the gate only after P. W. 3's entrance into the track, he would not have mentioned the said fact in Exhibit B-11. *Ex facie* on a reading of the statement, one would be clearly impressed that the shouting and the attempt to close the gates by the gateman were simultaneous and before P.W. 3 actually entered into the railway track. The prudent driver should have known that the gateman was trying to close the gate only to prevent him from entering into the track since the train was coming. But, in spite of these warnings, he has merely taken a risk in his anxiety to take the passengers to the Central Station. So, we hold that in utter disregard of the warnings, the driver P. W. 3 had entered into the level-crossing.

12. The next question, in our opinion, which arises for determination is about the capacity in which P. W. 3 drove his taxi over the level-crossing on the occasion of the accident. There are three categories in which persons visiting premises, belonging to another may fall. They are (1) by the invitation, express or implied of the occupier, (2) with the leave and licence of the occupier, and (3) as trespassers.

13. The meaning of the word "invitee" is given in the Shorter Oxford English Dictionary, IIIrd Edition, Volume 1, thus " One who is invited."

The meaning of the word " invite " is stated thus :

> " To ask (a person) graciously, kindly or courteously. (*a*) to come to (into etc.) a place or proceeding;
>
> (*b*) to do something assumed to the agreeable ;
>
> (*c*) to request,
>
> (*d*) to try to attract or induce
>
> *Of a thing*: to present inducements to (a person) to do something or proceed to place or action ;
>
> (*e*) to tend to bring on, to attract physically."

The meaning of the word "invite" as given in Funk and Wangnall's New Standard Dictionary of the English language, reads :

> " (1) to ask to do some act or go to some place; request the presence or the action of, usually as a favour or courtesy ; (2) to draw by means of temptations or allurements "

Stroud's Judicial Dictionary of Words and Phrases, IVth Edition, Volume 3, at page 1423, gives the definition of "invitee" thus :

> " An invitee means a person invited to the premises by the owner or occupier for purposes of business or of material interest.' "

In view of our finding that the taxi driver (P. W. 3) entered into the level-crossing in spite of the warnings given by the gateman, we hold that the taxi driver does not come under any of the definitions of the word " invitee " mentioned above.

The next question is whether P. W. 3 was a licensee. Stroud's Judicial Dictionary IVth Edition, Volume 3, at page 1539 defines the word " licensee " as follows :

> " A licensee is a person who has permission to do an act which without such permission would be unlawful."

It distinguishes " invitees " stating that "invitees" are persons who enter upon premises not as mere volunteers or licensees or guests or servants or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier and upon his invitation, express or implied, and further states that the leading distinction between an invitee and a licensee is that in the case of the former,

the invitor and the invitee have a common interest while in the latter the licensor and the licensee have none. While dealing with invitees and licensees, the House of Lords in *Robert Addie and Sons (Collieries) Ltd.* v. *Dumbreck*[1], held that the highest duty exists towards those persons who fall into the first category (*viz.* invitees) and who are present by the invitation of the occupier. Towards such persons, the occupier has the duty of taking reasonable care that the premises are safe. In case of persons who are not there by invitation, but who are there by leave and licence, express or implied, the duty is much less stringent—the occupier has no duty to ensure that the premises are safe, but he is bound not to create a trap or to allow a concealed danger to exist upon the said premises, which is not apparent to the visitor, but which is known or about to be known—to the occupier. Applying the above principles to this case, when the gates are opened and no warning is given, the public are permitted to cross the level-crossing, *i.e.*, to pass through the land belonging to the Railway within the level-crossing and to that extent they fall under the category of " licensees " during such periods. But, the moment the public come to know or have reason to believe about the approach of any train or engine —whatever may be the source through which they acquire such knowledge, for example, the ringing of the gongs or the burning of the red lights, the warning given by the gatemen etc.,—they are expressly prohibited under section 124 of the Railways Act from crossing the level crossing. In such contingencies, they would fall under the category of trespassers. On the evidence adduced in this case, it cannot be said that P.W. 3 was either an invitee or a licensee, because as we have already pointed out, the driver P.W. 3 of his own accord and risk entered into the level crossing in utter disregard of the warnings and without the consent and permission of the gateman. So, the duty of the occupier (Railway) to the invitee or licensee does not at all arise in this case.

14. When P.W. 3 does not fall within the categories of " invitee" and " licensee ", necessarily he has to fall under the third category "trespasser". The Draft Indian Penal Code, by section 418, defined the word ' trespasser " thus : " Whoever exercises any dominion over any property, not having a legal right independent of the consent of any other party to exercise such dominion, and not having the consent express or implied, of any party legally entitled to give a consent which would authorise the exercise of such dominion, is said to trespass. " Halsbury's Laws of England IIIrd Edition Volume 38 defines the word 'trespass ' as follows :

> " Trespass is a wrongful act done in disturbance of the possession of property of another, or against the person of another, against his will. To constitute a trespass the act must in general be unlawful at the time when it was committed.
>
> .... "

Here in this case, P.W. 3's act of entry into the railway track at the relevant time was unlawful as per section 124 of the Indian Railways Act. From the above discussion , there can be no doubt that P.W. 3 was a trespasser when he was on the track.

15. Then, we have to examine the duty of the occupier towards a trespasser. The House of Lords, in *Robert Addie and Sons* v. *Dumbreck*[1], has observed at page 365 thus:

> " Towards a trespasser the occupier has no duty to take reasonable care for his protection or even to protect him from concealed danger. The trespasser comes on the premises at his own risk. An occupier is in such a case liable only where the injury is due to some wilful act involving something more than the absence of reasonable care. There must be some act done with the deliberate intention of doing harm to the trespasser, or at least some act done with reckless disregard of the presence of the trespasser. "

16. This principle has been followed in almost all the English cases. In *Videan and another* v. *British Transport Commission*[2] Lord Denning, M.R. has observed:

1. (1929) A.C, 358.

1. (1929) A.C. 358.
2. (1963) 2 Q. B. 650.

"The simple test of foreseeability is sufficient to explain all the reported cases on trespassers, though not all the statements contained in them. All the circumstances must be taken into account to see whether the consequence is within the risk created by the negligence; but that principle applies only where the occupier or a contractor or any one else conducts activities on land and not where an occupier has done no work that of on land, for then his liability is an occupier and nothing else."

Lord Atkin in *Hillen and Pettigrew* v. *I.C.I. (Alkali) Ltd.*[1] observes :

"I know of no duty to a trespasser owed by the occupier other than, when the trespasser is known to be present, to abstain from doing an act which, if done carelessly, must reasonably be contemplated as likely to injure him, and, of course, to abstain from doing acts which are intended to injure him."

In *Commissioner for Railways* v. *Francis John Quinlain*[2], the respondent's truck, which was loaded with building materials and which he was driving over the crossing was struck by a train and the respondent was injured. The respondent had not obtained the permission to use the crossing. Their Lordships while holding that he was a trespasser, approved of the rule of the English Common law stated by Hamilton, L.J. with maximum brevity in *Latham* v. *R. Johnson and Nephew Ltd.*[3]

"The owner of the property is under a duty not to injure the trespasser wilfully; " not to do a wilful act in reckless disregard of ordinary humanity towards him; but otherwise a man ' trespasses at his own risk."

Their Lordships felt that the above words laying down the content and limits of the duty owed by the occupier towards the trespasser did not admit of much qualification or invite the skill of the amplifier. Accordingly the appellant was held not liable to the respondent in damages. The above principle is well considered in a recent decision of the Privy Council in *Southern Portland Cement Ltd.* v. *Rodney John Cooper*[1]. It was held that since the duty of an occupier towards a trespasser was based not on the relationship forced upon him but on considerations of humanity the occupier's duty only arose if he had knowledge of or had created the danger on his land; that no unreasonable burden was to be placed on an occupier and accordingly an occupier was entitled to consider all the disadvantages to himself in taking action for the protection of trespassers and weigh them against the degree of likelihood of trespassers and the degree of hidden or unexpected danger to which trespassers might be exposed. But, since the trespasser in that case was a child aged 13 years and since the occupier-appellant knew that children were likely to trespass on the land, of the likelihood of such children coming into contact with the danger on the land (electric cable on the sand-hill) their Lordships had to hold that the occupier was liable. However, the principle laid down in *Commissioner for Railways* v. *Francis John Quintain*[2], has been reiterated.

17. Bearing the above-said principles in mind we have to consider from the evidence on record and on a panoramic view of all the circumstances of this case, the placewere the trespass occurred, the nature of the danger etc., whether the engine-driver D.W. 3 did not know of and did not have good reason to anticipate the presence of the trespasser P.W. 3 on the railway track at the time of accident. The evidence of D.W. 3 is that after getting green signal at Kodambakkam he was running the train at a speed of 30 miles per hour with the engine search-light on and because, of the curve in the track just 50 yards north of the gate, the gate in question was visible only when the engine was about 30 yards north of it and not 200 yards as suggested by the learned counsel for the appellant. However the evidence of D.W.3, cannot be controverted because he is the man who has sighted the taxi at a distance of 30 yards. More over, it is the evidence of P.W. 3 himself that when his vehicle was on the eastern most railway track he heard people shout-

1. 1935 All E.R. Rep. 555 at 559: 1936 A.C. 65 at 70.
2. 1964 A.C. 1054 (P.C.) : (1964) 1 All E.R. (P.C.) 897.
3. (1913) 1 K.B. 398, 411 : 29 T.L.R. 124 (C.A.).

1. (1974) 2 W.L.R. 152.
2. (1964) 1 All E.R. 897: 1964 A.C. 1054.

ing that the train was approaching and that the impact occurred within two or three seconds of that noise. So everything would have happened within two or three seconds. Even on this admission of P.W. 3 the version of the engine driver that he sighted the taxi at a distance of 30 yards is acceptable and the train would have taken only two or three seconds to cover the said distance at the rate of 30 miles per hour. It is the evidence of D.W. 3 that he applied the brakes immediately but he could not stop the train on the spot, and in spite of the application of brakes the train moved on and stopped at a distance of 100 yards after the impact. Mr. K. Ramaswami appearing for the appellant argued that there is an inconsistent version between the evidence of D.W. 2 and that of D.W. 3 regarding the showing of the danger signal by the gateman to the in-coming train. This inconsistency is immaterial because D.W. 3 would say that even if he had seen the danger signal the train could not have been stopped before reaching the gate. When the driver did see the taxi on the track there was no sufficient time for him to pull up or to bring it at halt by applying the brakes before the impact took place. He has stated in Exhibit P-10 before the Enquiry Committee that he whistled before approaching the obstruction. Under these circumstances it cannot be said that the driver did not take any precaution against the possibility of the occurrence. It stands to reason that in a moment of extreme peril and difficult position, when the danger is unforeseen and mostly unexpected, D.W. 3 cannot be expected to have a perfect presence of mind accurate judgment and promptitude. It is quite clear from the evidence and the manner in which the occurrence has taken place, that upto the last stage of the incident D.W. 3 had no reason to anticipate the presence of the car on the track. Moreover, by no stretch of imagination can it be said that there was a wilful or reckless disregard by the engine driver of the presence of the taxi driver P.W. 3 so as to constitute a breach of duty on the part of D.W. 3 or lack of humanity or any failure to perform any lawful duty on his part. Under these circumstances, the engine-driver also cannot be attributed with want of nerve or skill which would amount to negligence. So, we hold that the engine driver did not cause the impact either by his wilful negligence or reckless carelessness towards the trespasser.

18. From the foregoing discussions we hold that P.W. 3 committed the unlawful act of trespass into the railway track and the accident was not caused due to any negligence on the part of the Railway Administration or its staff; but, on the other hand, it could not be averted in spite of the best efforts taken by the Railway Administration. So, the plaintiff, as the owner of the taxi, has no cause of action against the Railway Administration.

19. In the result, we confirm the decree and judgment of the Court below and dismiss this appeal with costs. The Court, fee, due on the appeal memorandum will be paid by the appellant.

R.S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P.R. Gokulakrishnan, J.*

Shanmughasundaram .. *Petitioner**

v.

Janagarajan .. *Respondent.*

Civil Procedure Code (V of 1908), *section* 11—*Suit for declaration—Cultivating tenant—Declaration as such—Plea of* res judicata—*Prior suit dismissed as settled out of Court—Whether constitutes* res judicata.

There cannot be any *res judicata* where the former suit had been dismissed as settled out of Court. [*Paras* 6.]

Cases referred to :—

Subba Rao v. *Jagannadha Rao*, (1964) 2 S.C.J. 518: (1964) 2 An.W.R. (S.C.) 112: (1964) 2 M.L.J. (S.C.) 112: (1964) 2 S.C.R. 310: A.I.R 1967 S.C. 591; *Subbathal* v. *Kittammal*, (1971) 1 M.L.J. 293; *Girjanand* v. *Bhagwan*, A.I.R. 1967 Pat. 101; *Shedodan Singh* v. *Daryao*

* C.R.P. No. 1888 of 1974.

11th February, 1975

Kunwar, (1966) 2 S.C.J. 768: (1966) 3 S.C.R. 300: A.I.R. 1966 S.C. 1332.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court District Munsif, Udumalpet dated 29th March, 1974 and made in O.S. No. 294 of 1972.

T. Rangaswami Iyengar, for Petitioner.

S. Palaniswami, for Respondent.

The Court delivered the following

JUDGMENT.—The first defendant in O.S. No. 294 of 1972, on the file of the Court of the District Munsif of Udumalpet, is the petitioner herein. The suit has been filed for a declaration that the plaintiff is the cultivating tenant of the suit property and for the consequential relief of permanent injunction against the defendants in order to restrain them from in any way interfering with the peaceful possession and enjoyment of the suit 'property by the plaintiff. Apart from various other contentions, the first defendant put forth the contention that the suit claim is barred by *res judicata* in view of the decision in O.S. No. 919 of 1970, on the file of the Court below, and as such the suit is not maintainable. The trial Court framed as many as six issues and took up for decision, as a preliminary issue; issue No. 1, as to whether the suit is barred by *res judicata*. The trial Court, after elaborately discussing the facts of the case, gave the finding that the suit is not barred by *res judicata*. Aggrieved by the said decision, the first defendant has preferred the present civil revision petition.

2. It is clear from the facts of the case that the plaintiff had filed O.S. No. 919 of 1970 to get himself declared as the cultivating tenant and for consequential relief. In that suit, a compromise was effected between the parties and the plaintiff agreed to vacate the suit land within six months from the date of the compromise if the defendant paid him a sum of Rs. 5,000 towards cultivation expenses. Since the compromise did not come into effect due to the failure of the first defendant to pay the agreed amount, the plaintiff continued to be in possession and enjoyment of the suit property as tenant. In view of this, the first defendant raised the plea of *res judicata*.

3. From Exhibits B-2 and B-3 it is clear that the suit O.S. No. 919 of 1970 was dismissed as settled out of Court and that half of the court-fee paid on that plaint was refunded. Exhibit B-4 shows that consequent to such dismissal of the suit, the *ad interim* injunction granted in favour of the plaintiff was vacated on the date of the dismissal of the suit. No written statement had been filed by the defendant in O.S. No. 919 of 1970 either denying or admitting the plea put forth by the plaintiff. It cannot therefore be said that the matter in issue in the present case was directly and substantially in issue in the former suit. The Court below has correctly observed that in view of the fact that the former suit was dismissed as settled out of Court on an alleged compromise between the parties it cannot be said that the Court had opportunity to apply its mind to an issue that could have been raised in that suit, even though it can be said that the parties had applied their mind to that matter between themselves.

4. Thiru T. Rangaswami Ayyangar, the learned counsel appearing for the petitioner, submitted that the doctrine of estoppel by *res judicata* will apply to the facts of the present case. In support of his contention, he cited the decision in *Subbathal* v. *Kittammal*[1] and *Girjanand* v. *Bhagwan*[2]. I have been taken through the judgments in those citations. The facts in those decisions are not similar to those in the present one. In the present case, no written statement was filed by the first defendant in O.S. No. 919 of 1970, apart from the fact of that suit having been dismissed as settled out of Court. Such is not the case in the above two decisions.

5. Thiru Palaniswami, the learned counsel appearing for the plaintiff-respondent cited the decision in *Subba Rao* v. *Jagannadha Rao*[3], wherein it has been stated:—

> "A compromise decree is not a decision by the Court. It is the acceptance by the Court of something to which the

1. (1971) 1 M.L.J. 293.
2. A.I.R. 1967 Pat. 101.
3. (1964) 2 S.C.J. 518 : (1964) 2 An.W.R. (S.C.) 112 : (1964) 2 M.L.J. (S.C.) 112 : (1964) 2 S.C.R. 310 : A.I.R. 1967 S.C. 591.

parties had agreed. A compromise decree merely sets the seal of the Court on the agreement of the parties. The Court does not decide anything. Nor can it be said that a decision of the Court was implicit in it. Only a decision by the Court can be *res judicata*, whether statutory under section 11 of the Code of Civil Procedure, or constructive as a matter of public policy on which the entire doctrine rests. Such a decree cannot strictly be regarded as decision on a matter which was heard and finally decided and cannot operate as *res judicata*. Such a decree might create an estoppel by conduct between the parties, but such an estoppel must be specifically pleaded".

It is submitted by Thiru Palaniswami that there is no such specific pleading of estoppel in the present case.

6. The next case cited by Thiru Palaniswami is *Shedodan Singh* v. *Daryao Kunwar*[1]. The Supreme Court held in that case:—

> "Where the trial Court has decided two suits having common issues on the merits and there are two appeals therefrom and one of them is dismissed on some preliminary ground, like limitation or default in printing, with the result that the trial Court's decision stands confirmed, the decision of the appeal Court will be *res judicata* and the appeal Court must be deemed to have heard and finally decided the matter. In such a case the result of the decision of the appeal Court is to confirm the decision of the trial Court given on merits, and if that is so, the decision of the appeal Court will be *res judicata*".

As far as the present case is concerned, the matter was not finally heard or decided in the prior suit on merits excepting that the Court dismissed that suit as settled out of Court even before the defendant filed the written statement. It is clear from the above two Supreme Court decision that there cannot be any *res judicata* if the former suit had been dismissed as settled out of Court. The Court below has correctly appreciated the facts and has held that the suit is not barred by *res judicata*. There is absolutely no question of jurisdiction involved in the civil revision petition for me to interfere with the decision arrived at by the Court below.

1. (1966) 2 S.C.J. 768 : (1966) 3 S.C.R. 300 : A.I.R. 1966 S.C. 1332.

7. The civil revision petition is dismissed. No costs.

S.J. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*A. Varadarajan, J.*

M.A. Rathinam .. *Petitioner**

v.

Thangammal .. *Respondent*

Tamil Nadu Agriculturists Relief Act (IV of 1938), section 20—Execution of decree—Application for stay under section 20—Applicant whether agriculturist entitled to benefits—Decided by the executing Court against the applicant—Revision—Scope of enquiry under section 20.

Section 20 of Act IV of 1938 does not say that execution must be stayed in all cases where it is represented that an application under section 19 of the Act would be filed. Therefore, when an application under section 20 is filed and it is opposed on the ground that the petitioner is not a person entitled to the benefits of the Act, that question has to be gone into and considered before stay can be granted under this section. There would be no question of any hardship in such a case, for, the parties are at liberty to adduce oral and documentary evidence with respect to their contentions and any finding regarding the question whether the petitioner is an agriculturist entitled to the benefits of the Act or not will be binding on both the parties and it cannot be stated that any hardship is caused to one party or the other by an enquiry under section 20 of the Act. The lower Court was right in going into the question whether the petitioner was an agriculturist entitled to the benefits of the Act in the petition filed under section 20 (of the Act).

[*Para.* 6.]

* C.R.P. No. 3428 of 1974.

4th March, 1975.

Case referred to:—

Dorairajan v. *Mohammed Kuthooses*, (1974) 87 L.W. 877.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge, Udumalpet dated 6th September, 1974 and made in E.A. No. 369 of 1974 in E.P. R. No. 60 of 1974 in O.S. No. 231 of 1970.

S. Nainarsundaram, for Petitioner.

S. Palaniswamy, for Respondent.

The Court made the following

ORDER.—The petition is to revise the order of the learned Subordinate Judge, Udumalpet made in E.A.No. 360 of 1974 which was filed under section 20 of the Tamil Nadu Agriculturists Relief Act, 1938 for stay of the execution of the decree obtained by the respondent against the petitioner in O.S. No. 231 of 1970 on the file of the same Court in E.P.R. No. 60 of 1974.

2. The petitioner alleged that after the decree had been obtained he paid Rs. 400 on 22nd November, 1972 and that he is an agriculturist entitled to the benefits of Act IV of 1938 and to have the decree scaled down. He alleged that he would file a petition for the purpose of sealing down of the debt under section 19 of the Act and prayed that the execution petition should therefore be stayed under the provisions of section 20 of the Act. The respondent opposed the petition contending that the petitioner was assessed to profession tax and owns two houses and one shop and pays property tax to the extent of Rs. 1,500 per annum and is not an agriculturist entitled to the benefits of the Act. The petitioner produced the kist recepits Exhibits A-1 and A-2 to show that he pays kist and owns agricultural lands. But, under section 3 proviso (c) of the Tamil Nadu Agriculturists Relief Act, 1938, the person shall not be deemed tobe an agriculturists, if he has, in all the four half years immediately preceding the 1st March, 1972, been assessed to property tax and house tax, provided that the aggregate annual rental value of such building and lands is not less than Rs. 1,200. On the basis of the extract from the property tax demand register Exhibit B-1 the lower Court found that the petitioner was paying property tax on properties, the annual rental value of which exceeded Rs. 1,200 and held that the petitioner is not an agriculturist entitled to the benefits of the Act and therefore was not entitled to have the execution proceedings stayed under the provisions of section 20.

3. The learned counsel for the petitioner raised two contentions, namely that the lower Court erred in finding that the annual rental value exceeds Rs. 1,200 and that it also erred in going into the question whether the petitioner is an agriculturist entitled to the benefits of the Act in the petition filed under section 20 of the Act for stay of his execution proceedings, while according to the learned counsel that question should be considered only in the enquiry under section 19 of the Act for scaling down the debt.

4. There is nothing to show that the annual rental value arrived at in Exhibit B-1 is not the net annual rental value but the gross rental value. That objection also does not appear to have been taken before the lower Court. The learned judge has found from columns 5 and 6 of Exhibit B-1 that the annual rental value comes to more than Rs. 1,200. The petitioner himself appears to have contended in the counter statement filed in E.P.No. 60 of 1974 that the shop fetches a rent of Rs. 300 per mensem and is worth Rs. 60,000 an that the upset price may be fixed at Rs. 75,000. Therefore, there can be no doubt that the petitioner pays property tax on house properties whose annual rental value exceeds Rs. 1,200 in the four half years. Therefore the petition is not an agriculturist entitled to the benefits of the Act.

6. The learned counsel for the petitioner invites my attention to the decision of Natarajan, J. in C.R.P.No. 2866 of 1973 and in *Dorairajan* v. *Mohammad Kuthoose*[1] where the learned judge has held that on the institution of an application under section 20, the executing Court should immediately grant a stay of the execution of the decree and that it would be anomalous to consider in that application whether the petitioner is entitled to the

1. (1974) 87 L.W. 877.

benefits of the Act and that this question would arise for consideration only in the application for scaling down the debt which may be filed by the petitioner. With respect, I am unable to agree with the learned judge, for section 20 reads thus :

> "Every Court executing a decree-passed against a person entitled to the benefits of this Act, shall, on application stay the proceedings until the Court which passed the decree has passed orders on an application made under section 19."

6. The section does not say that execution must be stayed in all cases where it is represented that an application under section 19 of the Act would be filed. Therefore, in my opinion when an application under section 20 is filed and it is opposed on the ground that the petitioner is not a person entitled to the benefits of the Act, that question has to be gone into and considered before the stay can be granted under this section. There would be no question of any hardship in such a case, for, the parties are at liberty to adduce oral and documentary evidence with respect to their contentions and any finding regarding the question whether the petitioner is an agriculturist entitled to the benefits of the Act or not will be binding on both the parties and it cannot be stated that any hardship is caused to one party or the other by an enquiry under section 20 of the Act. Therefore, I hold that the lower Count was right in going into the question whether the petitioner is an agriculturist entitled to the benefits of the Act in the petition filed under section 20. The finding of the Court below that he is not such a person is correct, having regard to Exhibit B-1.

7. This petition is therefore dismissed with costs.

S.J. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*G. Ramanujam, J.*

V. Ramanathan .. *Petitioner.**

v.

The Board of Revenue represented by Commissioner of Land Revenue and Transport, Madras-5 and others .. *Respondents.*

Madras Cinematograph Act (II of 1918) and Rules—No objection certificate for locating a permanent cinema subsisting—Fresh application during its pendency for locating touring cinema in same site—Subsisting certificate surrendered afterwards—Respondent applying before them—Determination of priority between the applications.

When a person has obtained a no-objection certificate for locating, either a permanent cinema or a touring cinema in respect of the particular site, so long as that no-objection certificate is current, he cannot make an application for the grant of a no-objection certificate is respect of the same site during the currency of the earlier no-objection certificate. Otherwise there will be two no-objection certificates in respect of the same site at the same point of time. This is not contemplated by the Cinematograph Act and the Rules. It is only when a no-objection certificate expires either by efflux of time or by surrender of the same to the concerned authority an application could be filed for the grant of a no-objection certificate in respect of the same site. Further, having regard to the purposes for which the no-objection certificate is obtained, while one no-objection certificate is current, it is not necessary nor is it possible to get another no-objection certificate for the same period in respect of the same site.

[*Para.* 9.]

Held on facts, in this case, admittedly, the no-objection certificate was surrendered only on 15th October, 1973. Therefore, though the application was filed by the petitioner on 15th September,

* W.P. No. 4341 of 1974.

4th March, 1975.

1973 the said application could be said to be validly filed and could be considered only on or after 15th October, 1973. In this view, the respondent's application having admittedly been filed on 17th September, 1973, could be taken to be prior in point of time.

[*Para.* 9.]

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith, the High Court will be pleased to issue a writ of *certiorari* calling for the records of the first Respondent relating to the proceedings in B.P. Rt. No. 5849 of 1974 (L) dated 29th November, 1974 and quash the same.

M. Veluswami and *D. Anandan*, for Petitioner.

R. D. Indrasenan and *N. Rajendra*, for Respondent No. 3.

S. Ramalingam, Assistant Government Pleader, for Respondents Nos. 1 and 2.

The Court made the following

ORDER.—The petitioner herein and the third respondent applied for a no-objection certificate for locating a touring cinema in the village of Vallalnathi, Periakulam Taluk. The Petitioner's application was filed on 15th September, 1973 and the third respondent's application, though dated 14th September, 1973, is found to have been properly presented only on 17th September, 1973. The petitioner's application was in respect of S. No. 423/A while the third respondent's application was in respect of S. No. 417/3.

2. The petitioner had obtained a no-objection certificate earlier for locating a permanent ciema in S.No. 423/1-A and the said certificate was current on 15th September, 1973, the date of the application for a no-objection certificate for establishing a touring cinema. It is not in dispute that both S.No.423/1-A and 417/3 were found suitable for locating touring cinemas. While the petitioner's application was recommended by the Panchayat, the third respondent's application was recommended by police authorities.

3. On the above facts, the second respondent, who is the authority empowered to grant no-objection certificates, considered that though the petitioner's application was earlier in point of time, the third respondent is to be given the no-objection certificate. In selecting the third respondent for the grant of no-objection certificate, the second respondent took the view that though the petitioner had earlier obtained no objection certificate for locating a permanent cinema in the same place he had not taken any steps in that regard and that his application for locating the touring cinema on the same site can only be with a view to see that no one gets a no-objection certificate for locating the touring cinema in the village in question.

4. On an appeal by the petitioner, the Board of Revenue had affirmed the order of the Collector though on a slightly different ground. The Board of Revenue having found that the applications filed by the petitioner as well as the third respondent were equal in all other respects, proceeded to hold that the grant of a no-objection certificate to the petitioner will amount to creation of a monopoly to run the cinema in the village on the family of the petitioner, and, that, therefore, the no-objection certificate has, rightly, been granted to the third respondent by the Collector. The decision of the Board of Revenue has been challenged in this Writ Petition.

5. The learned counsel for the petitioner contends that the Board of Revenue has misdirected itself on certain matters and, but for such a misdirection, the grant of a no-objection certificate would have been made in favour of the petitioner. The Board is said to have misdirected itself in stating that the petitioner's family had been continuously running the cinemas in the village and that in view of such a monopoly, the collections by way of entertainment tax, have gone down. It is pointed out by the learned counsel that the family of the petitioner has not been exhibiting touring cinemas in the village for a continuous period from 1962 to 1974 as stated by the Collector which has been acted upon by the Board, that one Kandasami Maniam who is said to have conducted the touring cinema in the years 1966-67, was not a member of

the petitioner's family, that one Mani who ran the touring cinema between the years 1971-74 is only the petitioner's brother-in-law and not a member of the family and that, therefore, the Board was not justified in taking the view that for a continuous period from 1962, the petitioner's family was having a monopoly of running the touring cinema in the village. It is also pointed out that the reduction in the collections by way of the entertainment tax can be due to various circumstances and that the Board was not justified in attributing the alleged monopoly as the cause for such a reduction in the entertainment tax. The learned counsel also pointed out that even before the Board, the petitioner, made a specific plea that he had become divided from his father and therefore, even if the petitioner's father had a monopoly, that circumstance cannot be taken against him but the Board of Revenue has not given any finding on the question as to whether the petitioner is or is not a divided member of the family. It is said that the petitioner's application, being earlier in point of time, the second respondent should have granted the no-objection certificate to the petitioner, straightaway, without reference to the third respondent's application. Reliance is placed upon the judgment of this Court in *Abdul Malick* v. *The Collector of Dharmapuri*[1].

6. After a due consideration of the matter, I am of the view that the petitioner is not right in his contention that the order of the Board of Revenue is vitiated for the reason that it did not give any finding on the question of partition which has been set up by the petitioner. Whether the petitioner has become divided from his father or not, the Board of Revenue is entitled to take into account the circumstances that the petitioner's father, originally, and thereafter, his brother and lastly, his brother-in-law had run the touring cinema in the same village and with a view to see that no monopoly exists in the running of touring cinemas in the village, it can consider any other applicant, for the grant of a no-objection certificate, who is otherwise suitable. If both the applicants were to be considered simultaneously for the grant of the certificate, the question is whether the petitioner's family had the monopoly of running the touring cinemas in the village. For considering this general question, it is not necessary to consider the relationship of the persons in the family in any detailed manner. In this case, both the Collector as well as the Board of Revenue felt that the petitioner's family having had a monopoly of running the touring cinema in the village all these years, it is not in the interests of the public to grant the no-objection certificate to the petitioner.

7. Now, coming to the question as to whether the applications of the petitioner as well as the third respondent should be disposed of on the basis of priority of applications, as has been held in *Abdul Malick* v. *The Collector of Dharmapuri*[1], the petitioner has claimed that his application was prior in point of time. According to him, his application was filed on 15th September, 1973, and the third respondent's application was properly filed on 17th September, 1973. Both the Collector as well as the Board of Revenue have proceeded on the basis that the petitioner's application was prior in point of time. Taking advantage of the observations made by them, the learned counsel for the petitioner claims that, by virtue of the above decision, the petitioner's application should have been, automatically, granted. But, the one crucial circumstance which has been touched by the Collector in his order but not considered by him has been overlooked by the Board of Revenue and that is this : The validity of the no-objection certificate granted to the petitioner in respect of the same site S. No. 423/1A was valid till 17th March, 1974. Therefore, on 15th September, 1973 the date of the petitioner's application for the grant of a no-objection certificate for locating a touring cinema for the site S.No.423/1A the earlier no-objection certificate for that site was current. The petitioner surrendered the no-objection certificate for locating permanent cinema in respect of the same site only on 15th

1. (1968) 1 M.L.J. 9.

1. (1968) 1 M.L.J. 9.

October, 1973, before the Collector. This is, presumably, for the reason that an objection was taken that an earlier no-objection certificate in respect of the same site was subsisting. The question is whether, the peitioner's application could be said to have been validly made on 15th September, 1973.

8. According to the learned counsel for the third respondent, the petitioner's application should be taken to have been validly made only on 15th October, 1973 when the no-objection certificate for a permanent cinema in the same site was surrendered by the petitioner and that this obvious position has been overlooked both by the Collector and the Board of Revenue. If the petitioner's application is taken to have been validly filed only on 15th October, 1973, then the third respondent's application, which was validly presented on 17th September, 1973 should be taken to be prior in point of time. But the learned counsel for the petitioner submits that the subsistence of a no-objection certificate in respect of the same site is not a bar for filing an application for a fresh no-objection certificate for the same site, and that the Cinematograph Act and the Rules framed thereunder, do not prevent a person who has got a no-objection certificate for a site, to apply, again, for another no-objection certificate with reference to the same site. I am not inclined to agree with the learned counsel for the petitioner in this regard.

9. When a person has obtained a no-objection certificate for locating, either a permanent cinema or a touring cinema in respect of the particular site, so long as that no-objection certificate is current, he cannot make an application for the grant of a no-objection certificate in respect of the same site during the currency the earlier no-objection certificate. As otherwise, it will lead to this situation. There will be two no-objection certificates in respect of the same site at the same point of time. This is not, obviously, contemplated by the Act and the Rules. It is only when a no-objection certificate expires either by efflux of time or by surrender of the same to the concerned authority, an application could be filed for the grant of a no-objection certificate in respect of the same site. Further, having regard to the purposes for which the no-objection certificate is obtained, while one no-objection certificate is current, it is not necessary nor is it possible to get another no-objection certificate for the same period in respect of the same site. In this case, admittedly, the no-objection certificate was surrendered only on 15th October, 1973. Therefore, though the application was filed by the petitioner on 15th September, 1973 the said application could be said to be validly filed and could be considered only on or after 15th October, 1973. In this view, the third respondent's application having, admittedly, been filed on 17th September, 1973 has to be taken to be prior in point of time. The learned counsel for the petitioner contends that both the authorities below having proceeded on the basis that the petitioner's application was validly filed on 15th September, 1973, it is not open to the third respondent to contend now before this Court that the petitioner's application should be taken to have been filed on 15th October, 1973, the date on which the earlier no-objection certificate was surrendered. However, having regard to the materials that are found in the orders of the Collector, a proper inference has not been drawn from those facts either by the Collector or by the Board of Revenue. Having regard to the admitted fact that the petitioner surrendered the earlier no-objection certificate only on 15th October, 1973 in respect of the same site, this Court cannot accept the view taken by the authorities below that the petitioner's application is earlier in point of time. In my view, the attack made against the ultimate order of the Board of Revenue upholding the grant in favour of the 3rd respondent cannot be sustained. This writ petition is, therefore, dismissed. There will be no order as to costs.

R.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*G. Ramanujam, J.*

T.P. Chandra .. *Petitioner**

v.

The Presiding Officer, Labour Court, Madras and another .. *Respondents.*

Tamil Nadu Shops and Establishments Act (XXXVI of 1947), *sections* 51, 2 (12), *Industrial Disputes Act (XIV of* 1947), *sections* 33-*C* (2), 2 (*s*)—*Decision of Commissioner of Labour under Shops Act—Not conclusive for purpose of other statutes—'Person employed'—Similarity in provisions in two statutes —Decision under one statute not conclusive with reference to other statute—Designation as Regional Superintendent—Not conclusive as to whether in managerial or administrative capacity.*

Though section 51 of the (Shops) Act (XXXVI of 1947) specifically provides that any decision rendered by the Commissioner of Labour under that section shall be final and shall not be liable to be questioned in any Court of law, it is not possible to say that the Presiding Officer, Labour Court, acting under section 33-C (2) of the Industrial Disputes Act, was bound by such a decision. The finality given to the orders passed by the Commissioner of Labour under section 51 of Act XXXVI of 1947 can only be for the purpose of that Act and not for the purposes of all other statutes. [*Para.* 7.]

The definition of "person employed" in section 2 (12) of the Shops Act is more or less similar to the definition in section 2 (*s*) of the Industrial Disputes Act; and the definition in section 2 (*s*) of "person employed" read with section 4 (1) excludes persons employed in a position of management. But the similarity in the provisions of the two different statutes will not make the decision under one statute conclusive with reference to the other statute. [*Para.* 7].

The fact that the petitioner was designated as the Regional Superintendent could not be taken to be conclusive on the question as to whether he was employed mainly in a managerial or administrative capacity. [*Para.* 10.]

Cases referred to:—

T.P. Chandra v. *Commissioner for Workmen's Compensation*, (1958) 1 L.L.J. 55: (1957) 2 M.L.J. 352 : 70 L.W. 691 : (1957) M.L.J. (Crl.) 532: A.I.R. 1957 Mad. 668: *Salem Sri Ramaswami Bank* v. *Commissioner for Workmen's Compensation*, (1956) 2 L.L.J. 40; *Prem Sagar* v. *S.V.O.C.*, (1964) 1 L.L.J. 47 : (1964) 5 S.C.R. 1030: A.I.R. 1965 S.C. 111 ; *C.G.G. Panicker* v. *T.M. Eapen*, (1975) 1 L.L.J. 126: (1975) Lab I.C. 972 ; *Town Municipal Council* v. *Mirzabhai*, (1968) 1 L.L.J. 785.

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavits filed therewith, the High Court will be pleased to issue writs of *certiorari* calling for the records pertaining to C. P. Nos. 590/70, 1021/70, 343/71, 451/71, 777/70 dated 19th February, 1972 respectively on the file of the 1st respondent in all the petitions and quash the said orders.

G. Venkataraman, for Petitioner.

A. N. Rajagopalan, for Respondent.

The Court made the following

ORDER.—The petitioner was employed as the Regional Superintendent by an order of appointment dated 5th July, 1962 of the second respondent company, hereinafter referred to as the Management. His salary at the time of the appointment was Rs. 400 per month and on his work being found to be satisfactory, the salary was raised subsequently to Rs. 450. In or about 1965, the management made certain allegations of inefficiency against the petitioner and sent its officers to check the working of the office at Madras, and after receipt of the report from them, it terminated the petitioner's service with effect from 1st December, 1965 without holding any sort of enquiry.

2. As against the order of termination, the petitioner filed an appeal under sec.

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* W.Ps. Nos. 49, 5591, 5593, 5594 and 5595 of 1973, *3rd April*, 1975.

tion 41 of the Tamil Nadu Shops and Establishments Act, 1947 hereinafter referred to as the Shops Act, to the Additional Commissioner for Workmen's Compensation. In the said appeal the management raised a preliminary objection to the maintainability of the appeal, firstly invoking section 4 (1) (*a*) of the Act alleging that the petitioner is a person employed in the position of management and secondly, invoking section 4 (1) (*b*) of the Act alleging that the petitioner's work involved travelling and canvassing. The management in fact filed two successive applications under section 51 of the said Act before the Commissioner of Labour for his decision as to whether the petitioner is a person employed in the position of management or as canvasser. The Commissioner of Labour held by his orders dated 9th December, 1966 and 22nd April, 1969 that the petitioner was not a person employed in the position of the management or as a canvasser. After the said decisions of the Commissioner of Labour under section 51 of the Act, the Additional Commissioner for Workmen's Compensation before whom the appeal against the order of petitioner's termination of services was pending rejected the preliminary objection and held on the materials placed before him that the termination of services of the petitioner by the management was not for reasonable cause and that, in any event, the termination of services of the petitioner having been made without due enquiry on the charges levelled against him it is void. He, therefore, by his order dated 11th November, 1969, set aside the order of termination passed by the management.

3. Consequent on the aforesaid order of the Additional Commissioner for Workmen's Compensation setting aside the order of termination, the petitioner filed the following five claim petitions before the first respondent under section 33-C (2) of the Industrial Disputes Act, with reference to the various periods, for computation of the monetary benefits which he is entitled to.

	Rs.	P.
1. C. P. No. 800 of 1970.		
Back wages from 11th December, 1965 to 25th March, 1970 at the rate of Rs. 450 per month	23,175	00
Bonus from 1962	3,550	00
	26,725	00
2. C. P. No. 777 of 1970.		
Wages from 26th March, 1970 to 25th May, 1970 at the rate of Rs. 450 per mensem	900	00
	900	00
3. C. P. No. 1021 of 1970.		
Wages from 26th May, 1970 to 25th July, 1970 at the rate of Rs. 450 per mensem	900	00
4. C. P. No. 343 of 1971.		
Wages from 26th July, 1970 to 25th June, 1971 at the rate of Rs. 450 per mensem	5,400	00
5. C. P. No. 451 of 1971.		
Wages from 26th June, 1971 to 25th September, 1971 at the rate of Rs. 450 per mensem	1,350	00

From a perusal of the reliefs claimed in the various claim petitions set out above, it will be seen that the petitioner has claimed wages from 11th December, 1965 to 25th September, 1971 at the rate of Rs. 450 per month and bonus of Rs. 3,550 for the year 1962.

4. The petitioner's case before the first respondent was that the legal effect of the order of the Additional Commissioner for Workmen's Compensation is that he continues to be in service and therefore he is entitled to wages for the period of his non-employment as also the bonus declared for the year 1962 while he was in service. The management resisted the petitioner's claims on the ground that in 1967 they had closed their Madras Office and, therefore, the relationship of Master and Servant did not exist between the management and the petitioner, and that, in any event, the petitioner cannot claim any relief before the first respondent

under section 33-C (2) as he was not a workman as defined in section 2 (*s*) of the Industrial Disputes Act.

5. The first respondent, Labour Court, had held that the petitioner is not a workman as defined in section 2 (*s*) of the Industrial Disputes Act and, therefore, he is not entitled to maintain the petitions. The first respondent also held that it is not open to the petitioner to file successive applications under section 33-C (2) in view of the decision of Sadasivam, J., in W. P. No. 2097 of 1966. In that view the first respondent dismissed the application. In these writ petitions the petitioner questions the said decision of the first respondent.

6. According to the petitioner, the decision of the Commissioner of Labour rendered under section 51 of the Shops Act holding that the petitioner has not been employed in a managerial capacity is final and conclusive and cannot be questioned in any Court of law, that the same should have been accepted by the first respondent, that even otherwise, the evidence adduced before the first respondent clearly established that the petitioner was not employed in a managerial capacity as alleged by the Management and that, therefore, the first respondent's finding that the petitioner was employed in a managerial capacity cannot legally be sustained. It is also the petitioner's case that the view of the Labour Court that successive applications cannot be filed under section 33-C (2) is quite untenable and it is opposed to the object and policy behind the said section which is intended to give summary relief without the necessity for the workman to resort to the ordinary Courts of law.

7. Though section 51 of the Act specifically provides that any decision rendered by the Commissioner of Labour under that section shall be final and shall not be liable to be questioned in any Court of law, it is not possible to say that the first respondent, acting under section 33-C (2) of the Industrial Disputes Act, was bound by the said decision. The finality given to the orders passed by the Commissioner of Labour under section 51 can only be for the purpose of that Act and not for the purpose of all other statutes. The decision of the Commissioner of Labour related to the interpretation of section 4 (1) read with section 2 (12) of the Shops Act. But the question which the first respondent has to decide was as to whether the petitioner is a workman as defined in section 2 (*s*) of the Industrial Disputes Act so as to enable him to file an application under section 33-C(2). It is true that the definition of "person employed" in section 2 (12) of the Shops Act is more or less similar to the definition in section 2 (*s*) of the Industrial Disputes Act and that the definition in section 2 (*s*) of "person employed" read with section 4 (1) excludes persons employed in a position of management. But the similarity in the provisions of two different statutes will not make the decision under one statute conclusive with reference to the other statute. The main question that has to be considered by the first respondent in the claim petitions was whether the petitioner was a workman as defined in section 2 (*s*) of the Industrial Disputes Act so as to enable him to file an application under section 33-C (2). Therefore the petitioner must satisfy the definition of section 2 (*s*) and it is not sufficient for him to say that he was held to be a person not in a managerial or supervisory capacity in an earlier proceeding against the same management under the Shops Act.

8. The further question is whether the order of the first respondent that the petitioner was not a workman as defined in section 2 (*s*) could be sustained on the materials on record. Section 2 (*s*) defines a workman as a person employed in any industry to do any skilled or unskilled manual, supervisory, technical or clerical work for hire or reward, but does not include any such person who is employed mainly in managerial or administrative capacity or who receives wages exceeding Rs. 500 per mensem either in a supervisory or managerial capacity. Admittedly the petitioner was receiving only a sum of Rs. 450 as his salary, and, therefore, the question whether he was employed in a supervisory or managerial capacity on a salary of over Rs. 500 a month, does not arise. It has only to be seen whether the petitioner was employed mainly in a managerial

or administrative capacity as set out in section 2 (s) (3).

9. The first respondent has proceeded on the basis that the management advertised for the post of a Regional Superintendent to take charge of its Madras Office, that the petitioner in his application for appointment had stated that he possessed 25 years of experience in sales, propaganda, sales organisation and as administrative branch manager in reputed firms, and that the petitioner was appointed as Regional Superintendent at Madras to look after the Madras Office. It found that the petitioner had called for applications to the post of an attender and had forwarded the same to the management at Bombay who had ultimately made the appointment, that the petitioner called for explanations for certain misconduct from one of the employees, and that the petitioner had usually signed as Regional Superintendent. All these facts were taken to show that the petitioner was appointed only in a managerial capacity as a Branch Manager at Madras and that the petitioner was in complete charge of the conduct of the business in the Madras Office. On these facts the first respondent has held that the petitioner was employed mainly in a managerial or administrative capacity and, therefore, he is not entitled to file an application under section 33-C (2) as a workman.

10. The first respondent also referred to the judgment of this Court in *T. P. Chandra* v. *Commissioner for Workmen's Compensation*[1], wherein the petitioner was found to have been employed in managerial capacity by another company, *M/s. Kemp and Co. Ltd.*, and said as to how after the said judgment the petitioner could claim that he was not employed in a managerial capacity. It is true in the said decision a Division Bench of this Court held, after considering the nature of work entrusted to by that management and rendered by the petitioner that the petitioner was employed in a position of management within the meaning of section 4 (1) (c) of the Shops Act. But that decision has no relevance to the question as to whether the petitioner's employment under the present management was in a managerial or administrative capacity, though the tests laid down in that decision for deciding a question of this kind may be useful. Therefore, the first respondent is not right in relying on the said decision as conclusive on the question as to whether the petitioner's employment under the present management was mainly in a managerial or administrative capacity. In the said decision it has been held that the designation given to an employee may not be decisive and that it is only the nature of the duties performed by him that is material and decisive.

11. The reasons given in the said case for holding the petitioner to be a person employed in a position of management within the meaning of section 4 (1) (a) of the Shops Act are these : The petitioner was acting in general management and control of the employer's establishment in Madras. He was in charge of the correspondence of the Madras branch, supervised the work of the clerks employed therein, operated the bank account made payments to and entered into contracts with third parties on behalf of the employer and generally represented the company in all its dealings at Madras and he also appointed some of the staff members and granted leave to them. His name was not entered in the register of employees maintained under the Shops Act. He never signed the register of employees. His name was not found in the muster rolls where the names of all the other employees had been noted.

12. The question is what are the factors in this case from which one could infer that the petitioner was employed in mainly a managerial or administrative capacity. Though the management has generally stated that the petitioner was in administrative charge of the Madras branch, and that there was no superior to him, the facts proved do not establish the same. The order of appointment dated 5th July, 1962 shows that the petitioner had no power to operate a bank account, that he had no power to appoint staff nor fix their salaries, that the salary of the staff was to be disbursed by the petitioner only at the ad-

1. (1958) 1 L.L.J. 55 : (1957) 2 M.L.J. 352 : 70 L.W. 691 : (1957) M.L.J. (Crl.) 532 : A.I.R. 1957 Mad. 668.

vise of the Bombay office, that the petitioner had no power to sign contracts on behalf of the company, that if any order is procured by the petitioner it has to be accepted by the Bombay office, that he had no power to make any commitment on behalf of the management, that the petitioner had no power to grant leave to the staff and that even if disciplinary action is taken against the staff it should be confirmed by the Bombay Office. The first respondent took the view that even though the petitioner had no initiative to do things as he likes, he, having been named as the Regional Superintendent, should be taken to have been employed mainly in a managerial or administrative capacity and that the fact that he obeyed the directions issued by the head office and had no authority to incur any expenditure not sanctioned by the head office will not make him nonetheless a person in the position of management. As already stated, the fact that the petitioner was designated as the Regional Superintendent, could not be taken to be conclusive on the question as to whether he was employed mainly in a managerial or administrative capacity.

13. It has been held by this Court in *Salem Sri Ramaswami Bank* v. *Commissioner for Workmen's Compensation*[1]:

> "Whether a person is employed in a position of management is a question of fact which has to be decided with reference to the circumstances of the particular case and that it is the valid assignment of work by the employer that should furnish the real test in deciding whether a given employee is a person employed in a position of management within the meaning of section 4 (1) (*a*) of the Act....For purpose of section 4 (1) (*a*) of the Act what was the work the employee actually did under the proper assignment of work by the employer would appear to be the real test."

In *Prem Sagar* v. *S.V.O.C.*[2], the Supreme Court, while laying down certain tests to determine the status of an employee for the purpose of determining the question as to whether he is a person in the position of management within the meaning of section 4 (1) (*a*) of the Shops Act has expressed:

> "It is difficult to lay down exhaustively all the tests which can be reasonably applied in deciding this question as several considerations would naturally be relevant in dealing with this problem. It may be enquired whether the person had a power to operate on the bank account or could make payment to third parties and enter into agreements with them on behalf of the employer; was he entitled, to represent the employer to the world at large in regard to the dealings of the employer with strangers; did he have authority to supervise the work of the clerks employed in the establishment; did he have control and charge of the correspondence; could he make commitments on behalf of the employer; could he grant leave to the members of the staff and hold disciplinary proceedings against them; has he power to appoint members of the staff or punish them; these and similar other tests may be usefully applied in determining the question about the status of an employee, in relation to the requirements of section 4 (1) (*a*). The salary drawn by the employee may have no significance and may not be material, though it may be treated the critically as a relevant factor."

It is argued by the petitioner's counsel that as per the tests laid down in the above cases, the petitioner would not be a person in the position of a management. It is said that the petitioner had no right to operate on the bank account or make payments to third parties without the approval of the head office, that he cannot also enter into contracts on behalf of the employer without prior approval, that he could not make commitments on behalf of his employer and that he could not grant leave to the members of the staff nor can be hold disciplinary proceedings against the staff though he had the control and charge of the correspondence of the branch office. Having regard to the facts established in this case, it is claimed that the petitioner cannot be said to be a person mainly employed in a managerial or administrative capacity merely be

1. (1956) 2 L.L.J. 40.
2. (1964) 1 L.L.J. 47 : (1964) 5 S.C.R. 1030 : A.I.R. 1965 S.C. 111.

cause he was held to be a person employed in such a capacity previously under another management. It is seen that the first respondent has not kept in mind the principles laid down in the above cases and had not analysed the facts in this case in the light of those cases. In my view, the first respondent has to consider the matter afresh after a due consideration of the terms of the appointment of and of the duties performed by the petitioner.

14. As regards the second contention that the view of the first respondent that successive applications under section 33-C (2) cannot be maintained, the learned counsel for the petitioner points out that the reliefs claimed in the various applications under section 33-C(2) are for different periods and, therefore, neither the principle of Order 2, rule 2, Civil Procedure Code, nor the principle of *res judicata* will apply. The learned counsel refers to the decision in *C.G.G. Panicker* v. *T.M. Eapen*[1], wherein the Kerala High Court held that if the claims relate to different periods the subsequent claims cannot be held to be barred by *res judicata.* Reliance also is placed on *Town Municipal Council* v. *Mirzabhai*[2], In that case a Division Bench of the Mysore High Court has held that the bar under Order 2, rule 2, Civil Procedure Code, cannot be applied to an application under section 33-C (2) of the Industrial Disputes Act and once the dismissal order has been held to be null and void in a suit, the salary payable to the employee whose services have not been lawfully terminated can apply under section 33-C (2). In this case the petitioner filed the said applications under section 33-C (2) for various periods. The petitioner's applications have been dismissed by the first respondent mainly on the ground that the petitioner is not a workman as defined in the Industrial Disputes Act. Now that this Court has held that the matter has to be considered afresh, the dismissal of the applications under section 33-C (2) other than the first one filed by the petitioner has to be set aside. The dismissal of the applications was mainly based on the fact that the petitioner was not a workman and the other reason that successive applications cannot be maintained appears to be merely an obiter. Therefore, the question whether successive applications for the amount of salary as and when accrued could be maintained has also to be considered in detail by the first respondent with reference to the decision of Sadasivam, J., as also the other subsequent decisions on the point. The Labour Court is, therefore, directed to decide the question fully in the light of the finding to be given on the question as to whether the petitioner is a workman as defined under the Industrial Disputes Act.

15. The result is all the writ petitions are allowed with costs only in W. P. No. 49 of 1973. Counsel's fee Rs. 150. The first respondent will dispose of the matter afresh in accordance with law.

S.J. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*S. Mohan, J.*

S. Sundaresa Mudaliar .. *Petitioner**

v.

Mayavaram Financial Corporation Ltd., by its Managing Director R. Kalyanasundaram, Mayavaram, and others .. *Respondents.*

Civil Procedure Code (*V of* 1908), *Order* 6, *rule* 17—*Suit for money—Chit fund—Suit against debtor and surety — Consent decree passed with the consent of debtor—Death of surety before the consent decree—Legal representatives of surety brought on record after consent decree— Whether correct.*

A chit fund brought a suit against the borrower, the first defendant and the surety, the second defendant. A consent decree was passed on 10th February, 1971. But earlier to this decree, on 12th January, 1971 itself the surety had died. Subsequent to the consent decree the legal representatives of the surety were brought on record by an interlocutory application

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1. (1975) 1 L.L.J. 126 : (1975) Lab.I.C. 972.
2. (1968) 1 L.L.J. 785.

* C.R.P. No. 3052 of 1974. 16*th July*, 1975.

and the consent decree was made binding on them. This was challenged by the legal representatives.

Held : The proper procedure would be to implead the legal representatives and to afford them an opportunity to contest the suit. But the Court below had not adopted that procedure. Therefore, the order of the Court was liable to be set aside and the matter remanded.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the Principal Subordinate Judge, Pondicherry dated 18th July, 1974 and made in I.A. No. 461 of 1972 in O.S. No. 37 of 1970.

G. Masilamani, for Petitioner.

T.R. Rajaraman and *T.R. Rajagopalan*, for Respondent.

The Court made the following

ORDER.—O.S. No. 37 of 1970 was preferred by the first responden therein (Mayavaram Financial Corporation Limited) against the first defendant, the borrower, from the Chit fund and the second defendant his surety. On 10th February, 1971 there was a consent decree. Even earlier to this decree, on 12th January, 1971 itself the second defendant had died. Properly speaking, therefore, there could not be any valid consent on behalf of the second defendant. However, I.A. No. 461 of 1972 was filed under Order 6, rule 17, Civil Procedure Code, to amend the cause title and to implead the legal representatives of the second defendant as parties to the suit and the decree so as to make it binding on them. I.A. Nos. 1637 to 1640 of 1973 were also taken up to set aside the abatement, to bring on record the legal representatives and also to condone the delay under Order 22, rule 9, Civil Procedure Code. Curiously enough in none of those interlocutory applications, the legal representatives were impleaded as respondents. Whatever that may be, I.A. No. 461 of 1972 had been allowed the effect of which would be to substitute the legal representatives in the place of the second defendant to the decree dated 10th February, 1971. Aggrieved by this order, the present revision has been preferred. It is needless for me to mention that this substitution cannot straightway be done so as to affect the rights of the legal representatives since, as noted above even as early as 12th January, 1971 the second defendant had died and therefore, there cannot be a valid consent on his behalf. The proper procedure would be to implead the legal representatives and to afford them an opportunity to contest the suit on merits. But the Court below has not adopted that procedure. Therefore, the order of the Court below is set aside and the revision petition will stand allowed and the matter will be remanded. With regard to the delay in setting aside the abatement, I think this is eminently a fit case in which the Court should come to the rescue of the petitioner plaintiff (respondent-herein). Therefore, it will condone the delay and implead the legal representatives and proceed to try O.S. No. 37 of 1970 on merits. There will be no order as to costs.

S.J. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*S. Mohan, J.*

Ahamad Ibrahim .. *Appellant**

v.

N.M.K. Syed Mohideen and others .. *Respondents.*

Civil Procedure Code (*V of* 1908), *Order* 21, *rule* 90—*Decree—Sale in execution—Claim suit—Claim negatived—Suit to set aside claim order—Compromise—Judgment-debtor and auction purchaser not party to compromise—Binding nature of.*

There is absolutely no doubt that in a mere claim suit, neither the auction-purchaser nor the judgment-debtor is a necessary party, since all that the claimant seeks to agitate is that the decree-holder should not have brought the property to sale as there was no saleable interest. But in a compromise entered into between the parties to a suit to set aside a claim order, if the auction-purchaser is not a party to the compromise it could not be enforced against him.

[*Para.* 5.]

*S.A. No. 664 of 1972. 25*th February*, 1975.

Cases referred to:—

Velu Padayachi v. *Arumugham Pillai*, (1920) 38 M.L.J. 397: 11 L.W. 343: 56 I.C. 481; *Chimpiramma* v. *Subramanyam*, I.L.R. (1956) A.P. 874 : 1956 An.L.T. 1010 : 1956 An.W.R. 1137 : A.I.R. 1957 A.P. 61. (F.B.)

Appeal against the decree dated 17th March, 1971 Court of the Subordinate Judge, Ramanathapuram at Madurai, in Appeal Suit No. 90 of 1970, preferred against the decree of the Court of the District Munsif of Ramanathapuram, in Original Suit No. 224 of 1966.

K. Parasaran, R. Thiagarajan and *V. Radhakrishnan*, for Appellant.

K.T. Paul Pandian and *G.V. Srinivasalu*, for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff is the appellant. He filed a suit in O.S. No. 224 of 1966 on the file of the District Munsif's Court of Ramanathapuram for declaration and possession. The suit property measures 20 feet east to west and 24 feet south to north in Ward No. 1 of Keelakarai Panchayat and a hut bearing Door No. 204-A standing thereon. There was also a prayer for injunction.

2. The property originally belonged to one Madar Ammal. She made an oral gift of the entire property to her daughter Syed Ali Bathumal. She had another daughter by name Yusuf Sulaika and a son by name Seeni Mohammed. Seeni Mohamed married Mohammed Ameena Ummal. After the death of Syed Ali Bathumal, a half share of the property devolved upon her daughter Mohamed Aisha and the dispute in this second appeal relates only to this half share. Consequent to this devolution Aisha sold the property in favour of the predecessor-in-interest of the plaintiff. Mohammed Ameena Ummal filed O.S. No. 1 of 1945 against Seeni Mohamed, her husband. That resulted in a decree. Thereupon in execution of the decree, the defendant purchased 2/3rds of the suit property in Court-auction. Sulaika, the other daughter preferred a claim petition under Order 21, rule 90, Code of Civil Procedure, and her claim was allowed and thus the matter reached a finality as far as O.S. No. 1 of 1946 was concerned. However, Aisha also filed a claim concerning her half share which was negatived. There upon she preferred O.S. No. 402 of 1950 on the first of September, 1950 to set aside the dismissal of her claim. In that suit she entered into a compromise with Ameena Ummal. It may be noted here that neither Seeni Mohamed, the judgment debtor nor the auction-purchaser Mohamed Khasim, the first defendant, who died pending suit (whose L.R's have been brought on record) was made a party to this compromise. The plaintiff, contending that neither the judgment-debtor nor the auction-purchaser is a necessary party to the claim suit preferred the present suit and also contended that his title ought to be upheld in view of the oral gift. In defence it was pleaded that in so far as neither the decree-holder nor the auction purchaser who purchased 2/3rds of the suit property in execution of O.S. No. 1 of 1946 had not been impleaded in the suit, any compromise between Mohamed Ameena Ummal and Aisha, the predecessor-in-title of the plaintiff, would not be binding. Factually there was no oral gift and therefore the plaintiff could not base his title on the strength of the so-called oral gift. The learned District Munsif, before when the matter came up for trial, on a consideration of the oral and documentary evidence decreed the suit whereupon the defendants filed A.S.No. 90 of 1970, and the learned Subordinate Judge reversed the findings of the trial Court and dismissed the suit. Hence the present second appeal.

3. The learned counsel for the appellant submits that the lower appellate Court erred in reversing the judgment of the trial Court since it is a well-settled proposition of law that neither the auction-purchaser nor the decree-holder is a necessary party to a claim suit and in support of the same he relies on the decision reported in *Velu Padayachi* v. *Arumugam Pillai*[1] and also *Chimpiramma* v. *Subramanyam*[2]. It is his further submission

1. (1920) 38 M.L.J. 397 : 11 L.W. 343 : 56 I.C. 481.

2. I.L.R. (1956) A.P. 874 : 1956 An.L.T. 1010 : 1956 An.W.R. 1137 : A.I.R. 1957 A.P. 61 (F.B.).

that in any event, there being a valid oral gift, his title ought to have been upheld by the lower appellate Court as was found by the trial Munsif. Mr. K.T. Paul Pandian the learned counsel for the respondents does not dispute the abstract proposition of law that in a claim suit, neither the auction-purchaser nor the judgment-debtor would be a necessary party. But he would urge that the question here is about the binding nature of the compromise entered into between the parties in the absence of the auction-purchaser and the judgment-debtor and he also in his turn would rely on *Chimpiramma* v. *Subramanyam*[1], itself and contend that in so far as they were not made parties to the compromise, it could not be enforced as against them.

4. It is his further submission on evidence that it has been found by the Lower Appellate Court that there was no valid oral gift and as such no interference is called for on this point.

5. There is absolutely no doubt that in a mere claim suit neither the auction-purchaser nor the judgment-debtor is a necessary party, since all that the claimant seeks to agitate is that the decree-holder should not have brought the property to sale as there was no saleable interest and this is the reason why in *Velu Padayachi* v. *Arumugham Pillai*[2], Sadasiva Aiyar, J., at page 401 observed:

> "No case has been quoted in which it has been held that such a startling result follows the omission to make the judgment-debtor a party to the claim proceedings. On the other hand, it has been held in several cases that the judgment-debtor is not a necessary party to a claim proceeding and that the proper parties to such a proceeding are the decree-holder and the claimant. Of course, if the judgment-debtor intervenes actively, opposes the claim along with the decree-holder and the claim petition succeeds, he may be bound by the order unless he sets it aside within one year as the order may be then said to be passed against him also. But ordinarily, it is the decree-holder's right to bring the property to sale against the claim of the claimant's right to have the property released (or sold subject to the claimant and the claim) which are litigated in such a petition. The auction-purchaser is entitled to take advantage of the order against the claimant in such a case (if it is not set aside by a suit within one year) not because the purchaser is the representative of the decree-holder but because the order which established the right of the decree-holder to bring the property to sale against the claim of the claimant cannot be given effect to otherwise and was clearly intended by the Legislature to have the effect of precluding the claimant from putting forward his claim again in opposition to the auction-purchaser at the sale held in pursuance of the order against the claimant. The conclusive establishment of the decree-holder's right to being the property to sale free from the claimant's alleged encumbrance involves the right of the purchaser at the sale to get a title to the property free from such encumbrance."

In *Chimpiramma* v. *Subramanyam*[1], at page 65 the Full Bench lays down the law as follows:

> "The scope of the decision or a claim order has been correctly stated in cases where the judgment-debtor is not made a party. But where the judgment debtor is made a party, I would prefer the Madras view and hold that the order against the judgment-debtor cannot be questioned unless he gets it vacated within the time prescribed. It may therefore be taken as settled law, and also consistent with practice that a judgment-debtor need not be made a party to claim proceedings in which case, the Court decides only the right of the decree-holder to bring the property to sale against the claim of the claimant's right to have the property released.
>
> Such an order would not obviously bar the judgment-debtor who was not a party to the proceedings. It is equally settled that a judgment-debtor can also be made a party to such a

1. 1956 An.W.R. 1137 : A.I.R. 1957 A.P. 61 (F.B.).
2. (1920) 38 M.L.J. 397 ; 11 L.W. 343 : 56 I.C. 481.

1. 1956 An.W.R. 1137 : A.I.R. 1957 A.P. 61 (F.B.).

proceeding and in that event it would be binding on him and preclude him from setting up his claim unless he gets the said order set aside in a suit filed under Order 21, rule 63, Civil Procedure Code, within the time prescribed".

As rightly contended by Mr. K. T. Paul Pandian, as propositions of law no exception could be taken to the submission of the learned counsel for the appellant. But the point here is somewhat different. As seen above, the compromise was entered into between Aisha on one hand and Mohamed Ameena Ummal, the decree-holder in O. S. No. 1 of 1946. Though no doubt O.S. No. 402 of 1950, came to be filed on the first of September, 1950 and the auction-purchaser (first defendant) purchased the property in Court-auction in execution of the decree in O. S. No. 1 of 1946, only on 12th September, 1950 the compromise came to be entered into only in 1952 by which time the rights of the defendants came to be crystalised under the Court-auction-purchaser. Therefore to such a compromise, unless he was a party it could not be enforced as against him. This is far from saying that the auction-purchaser or the judgment-debtor is not a necessary party to a claim suit. In this view, neither of the decisions quoted above would have any application to the facts of the present case. It is somewhat interesting to note that the very decision of the Full Bench of the Andhra Pradesh High Court shows that if it was sought to be enforced against these persons, they must be impleaded as parties.

6. Turning to the question of oral gift, it has been categorically found by the Courts below that there is a good deal of inconsistency between the versions relating to the oral gift. In fact P. W. 3 would admit during her cross-examination that she had no knowledge of the gift in favour of her mother, and therefore, rightly, the lower appellate Court did not accept the plea of oral gift. The net result is both the points raised by the learned counsel for the appellant fail and I therefore dismiss the second appeal with costs. No leave.

R.S. —— *Second appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—*G. Ramanujam, J.*

U. Gopalan and others .. *Petitioners**

v.

The Accountant-General, Tamil Nadu, Madras-18 .. *Respondent.*

Manual of Standing Orders (Administrative), Chapter V—Subordinate Account Service—S. A. S. Accountant posted to upgraded Divisional Accountant post—Order challenged—Whether reduction in rank—Whether colourable exercise of power.

The petitioner were S. A. S. Accountants in the office of the Accountant-General, Madras. They were posted as S. A.S. Divisional Accountants in various public works divisions. Challenging the validity of the said order the petitioners contended that the order amounted to an order of reduction in rank and was illegal and amounted to colourable exercise of power.

Held, in view of the fact that the petitioners continued to receive the pay on the scale applicable to the S. A. S. Cadre, it cannot be said that the petitioners had suffered reduction in their pay.

[*Para.* 7.]

The Comptroller and Auditor-General had earlier upgraded the posts of Divisional Accountants in certain Public Works Divisions as S. A. S. Cadre posts and it was only thereafter the petitioners who belonged to the S. A. S. Cadre were posted as Divisional Accountants in those upgraded divisions. So long as the petitioners were borne in the cadre of S. A. S. with the same pay scale, they could not make a grievance that they were asked to do somewhat different kind of work.

[*Paras.* 9 *and* 10.]

* W.Ps. Nos. 1847 to 1849, 1851, 1852, 2051, 2052 and 2160 of 1972. 18*th March*, 1975.

Cases referred to:—

K. Gopaul v. *Union of India*, (1967) 3 S.C.R. 627 : A.I.R. 1967 S.C. 1864; *E. P. Royappa* v. *State of Tamil Nadu*, A.I.R. 1974 S.C. 555.

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the respective affidavits filed therewith the High Court will be pleased to issue a writs of *certiorari* (1) calling for the records in Estt. I/GL. VI/PW/5-1/72-73/163 on the file of the respondent (1) and quash the order, dated 18th July, 1972 (W. P. Nos. 1847, 1848, 1849, 1851, 2051, 2052 and 2160 of 1972); (2) calling for the records in Estt. I/GL. VI/P.W./5-1 72-73/168 and quash the order dated 20th July, 1972 (W.P. No. 1852 of 1972).

T. R. Mani and *S. Rajagopalan*, for Petitioners.

The Advocate-General for the Junior Central Government Standing Counsel for Respondent.

The Court made the following

ORDER.—As all the above writ petitions raise practically the same issues, they are disposed of together.

2. All the petitioners had joined the office of the Accountant-General, Madras as Upper Division Clerks. Later they had passed the Subordinate Account Service examination after undergoing the requisite training in public works division. Then they were promoted and posted as S. A. S. Accountants.

3. By an office order dated 18th July, 1972 the petitioners and others were posted as S. A. S. Divisional Accountants in the various Public Works Divisions of the State and Central Governments. The validity of the said order has been questioned in these writ petitions.

4. It has been contended by the petitioners. (1) that though the said office order purports to be a posting order, in effect and in substance it amounts to an order of reduction in rank; and (2) that the said office order is illegal as it is berefit of legal authority and it also amounts to a colourable exercise of power. The question is how far the petitioners have substantiated the said contentions.

5. According to the petitioners, the service conditions of the members of the Subordinate Accounts Service cadre are regulated by Chapter V of the Manual of Standing Orders (Administrative) (hereinafter referred to as M.S.O.) issued by the Comptroller and Auditor-General of India. Chapter VII of the Manual of Standing Orders regulates the service conditions of the Divisional Accountants who constitute a separate cadre. Manual of Standing Orders prescribes separate qualifications, the source and conditions of recruitment and the practical training required for the members of these two cadres. Subordinate Accounts Service is a higher cadre carrying higher scales of pay than Divisional Accounts Cadre. While the scale of pay applicable to Subordinate Accounts Service is Rs.270, 575, the scale of pay applicable to Divisional Accountants is Rs.180 - 440. According to the Manual of Standing Orders Divisional Accountants become eligible for appointment to the Subordinate Accounts Service only after passing the Subordinate Account Service examination and completing the necessary training. In fixing the seniority in the Subordinate Accounts Service cadre the service as Divisional Accountants is equated to that of Upper Division Clerks only. Posts in the Subordinate Accounts Service cadre can be created only by the Comptroller and Auditor-General of India but the posts of Divisional Accountants can be created by the Accountant-General. It is said that in view of the above position the posting of the petitioners who are of Subordinate Accounts Service cadre as Divisional Accountants not only amounts to a demotion but also is with-out any legal authority as there is no provision whatever in the M. S. O. for a Subordinate Accounts Service Officer being posted as a Divisional Accountant.

6. In the common counter-affidavit filed by the respondent in all the writ petitions it has been stated that the petitioners have been posted to the upgraded divisions created by the Comptroller and Auditor-General of India, the competent authority under the M. S. O., that in the said upgraded posts of Divisional

Accountants the petitioners will be receiving the salary only as Subordinate Accounts Service accountants and will continue to be governed by the conditions of service as are applicable to Subordinate Accounts Service accountants, that Subordinate Accounts Service personnel are posted to up-graded divisions by rotation normally for a period of two years after which they are withdrawan to the head office, and that in fact there are about 38 persons working as Divisional Accountants (against 46 upgraded posts of Divisional Accountants) in different places and in different divisions. It is also stated in the counter-affidavit that the system has been in vogue from 1948, that the same is not a recent innovation, that all the petitioners have joined service after 1948 and, that therefore, they were well aware of the said system which has been in vogue from 1948. Thus the stand taken by the respondent is that by the impugned posting order there is no reduction in rank or in emoluments as alleged by the petitioners and that it is quite in accordance with the provisions in the M.S.O.

7. It is not in dispute that the divisions to which the petitioners have been posted as Divisional Accountants are upgraded public works divisions, that the petitioners will continue to draw the pay in the Subordinate Accounts Service scale and that the service as a Divisional Accountant will count for increment in the Subordinate Accounts Service scale. It is also not disputed that the petitioners continue to be members of the Subordinate Accounts Service cadre even after the posting. Though it is conceded by the petitioners that their pay scales remain the same, they state that the total emoluments received by them as Divisional Accountants are in some cases less than what they would receive as Subordinate Accounts Service accountants. It is true, in some instances the allowances payable to some of the petitioners as Divisional Accountants are less than what they would have been getting otherwise. The quantum of the various allowances is normally determined with reference to the place of work etc. The pecuniary loss in total emoluments in some of the cases appears to be due to the regulations relating to house rent allowance and city compensatory allowance applicable to the particular place of duty. Merely because there is a drop in the various allowances received by the petitioners with reference to their place of duty it cannot be taken advantage of by them to say that there has been a reduction in their pay. In view of the fact that the petitioners continue to receive the pay on the scale applicable to the Subordinate Accounts Service cadre, it cannot be said that the petitioners have suffered reduction in their pay.

8. The other grievance of the petitioners that there have been reduction in rank in that they has been demoted to a lower cadre of Divisional Accountants has now to be considered. It is true, normally Divisional Accountants who are functioning in the ordinary Public Works Divisions are lower in rank than S. A. S. personnel, as there is a clear cut distinction under the M. S. O. between S. A. S. cadre and the Divisional Accountants cadre. But in these cases the divisions to which the petitioners have been posted are not ordinary divisions but are those which have been upgraded by a specific order of the Comptroller and Auditor-General in exercise of the powers under the M. S. O. The power of the Comptroller and Auditor-General of India to upgrade Divisional Accountants' Posts in certain public work divisions as S.A.S. posts has not been and in connot be disputed in this case. Once certain posts are upgraded as S. A. S. posts, then the petitioners' transfer or posting to such upgraded posts in the S. A. S. cadre, can be made under Fundamental Rule 15 read with serial No. 6-A of appendix 4 of the Fundamental Rules. Fundamental Rule 15 is as follows :

> " 15 (*a*) The Governor-General in Council may transfer a Government servant from one post to another, provided that except—
>
> (1) on account of inefficiency or misbehaviour, or (2) on his written request;
>
> a Government servant shall not be transferred substantively to, or ex-

cept in a case covered by rule 49, appointed to official, in a post carrying less pay than the pay of the permanent post on which he holds a lien, or would hold a lien had his lien not been suspended under rule 14."

The power of transfer contemplated by Fundamental Rule 15 has been given to all heads of departments under the said serial No. 6-A of Appendix 4. Under Serial No. 38 of Appendix 4 the Accountants General are the heads of departments. Therefore the power of the Accountant-General to transfer the petitioners from one post to another equivalent post canot be questioned.

9. The learned counsel for the petitioners would contend that the posts of Divisional Accountants to which the petitioners have been transferred, though upgraded, cannot be treated as equivalent posts and there is no declaration of equivalence by the Comptroller and Auditor-General. But as already stated, the Comptroller and Auditor-General has earlier upgraded the posts of Divisional Accountants in certain Public Works Divisions as S. A. S. cadre posts and it is only thereafter the petitioners who belong to the S. A. S. cadre have been posted as Divisional Accountants in those upgraded divisions.

10. The learned counsel for the petitioners would contend that even after such upgrading the work of such upgraded Divisional Accountants is different from the normal work assigned to an S. A. S. Officer. According to him the work of an S. A. S. Officer is supervision and auditing, while the work of a Divisional Accountant is only to maintain accounts etc., without any supervision or audit work, and because of the difference in the nature of their work, Divisional Accountants' posts even after upgrading cannot be treated as equivalent posts. But I am not inclined to agree with the learned counsel for the petitioners that merely because the nature of work done by the S. A. S. personnel posted as Divisional Accountants in the upgraded Public Works Divisions is somewhat different they should be treated as having been posted to a different and a lower cadre. In *K. Gopaul* v. *Union of India*[1], an officer functioning as a head of the Department in his capacity as the Inspector-General of Registration was transferred to the post of Accommodation Controller which has not been designated as the post of the Head of Department. The Supreme Court held that it does not involve any reduction in rank. The following observations of the Supreme Court are very pertinent:

> " We cannot accept the submission that the mere fact that the post of Accommodation Controller to which the appellant has been transferred, has not been designated as the post of a Head of the Department necessarily involves any reduction in rank. In fact, it is well known that in Government service, there may be senior posts, the holders of which are not declared as Heads of Department, while persons holding comparatively junior posts may be declared as such. The rank in Government service does not depend on the mere circumstance that the Government servant in the discharge of his duties, is given certain powers."

Therefore on the analogy of the above decision it has to be held that though the powers exercised and the nature of work done by the petitioners as Divisional Accountants in the upgraded public works divisions, are somewhat different from the actual work done by other S. A. S. personnel, so long as the petitioners are borne in the cadre of S. A. S. with the same pay scale, they cannot make a grievance that they are asked to do a somewhat different kind of work.

11. The learned counsel for the petitioners then contend that the M. S. O. specifically provides for the creation of selection grade Divisional Accountants for undertaking more important and responsible work in heavier public works divisions and that procedure should have been adopted by upgrading some of the posts of Divisional Accountants, instead of posting S.A.S. personnel as Divisional Accountants. This contention can have no force especially in the context of the position explained in the counter-affida-

1. (1967) 3 S.C.R. 627: A.I.R. 1967 S.C. 1864.

vit of the respondent that the work involved in the upgraded divisions is still more onerous and responsible which the selection-grade Divisional Accountants cannot undertake or manage, and that therefore the necessity to create the posts of S. A. S. accountants for taking charge of those upgraded divisions arose. It is not, therefore, possible to say that the creation of new posts in the S. A. S. cadre to man the upgraded public works divisions cannot (can?) be said to be contrary to the provisions of the M. S. O.

12. The learned counsel for the petitioners relied on the decision of the Supreme Court in *E.P. Royappa* v. *State of Tamil Nadu* [1], in support of his stand that the upgraded post of Divisional Accountants has not been declared to be equivalent with the posts of S. A. S. personnel and unless there is such a declaration it is not open to the respondent to treat the upgraded posts of Divisional Accountants as equivalent to S. A. S. cadre posts. In that case the Supreme Court pointed out the necessity for a declaration in writing after ascertaining the equality of status and responsibility of the post occupied by the Government servant and the post to which he has been transferred. But that decision was rendered with reference to rule 4 (2) of the Indian Administrative Service (Cadre) Rules, 1954, which permits the State Government to add for a period mentioned therein, to the cadre one or more posts carrying duties and responsibilities of a like nature of a cadre post. It is in the light of the said provision the Supreme Court pointed out the necessity for a declaration that the post created is an equivalent cadre post with a view to preserve respectability and responsibility of the I. A. S. cadre officers who may be posted to such posts created. In my view, this decision cannot be of any assistance to the petitioners in this case. Hence all the contentions raised by the petitioners are not tenable.

13. The writ petitions, therefore, fail and they are dismissed but without costs.

S.J. —— *Petitions dismissed.*

1. A.I.R. 1974 S.C. 555.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*P. R. Gokulakrishnan, J.*

Mathi Ammal .. *Petitioner.**

v.

Ajjan and others .. *Respondents.*

Limitation Act (XXXVI of 1963), section 5—Appeal—Death of one of the appellants——Abatement—Applications to excuse delay, set aside abatement and bring on record the L. Rs. of the deceased—Delay of more than 2 years—Application allowed—Whether valid—"Sufficient cause"—To be liberally construed—High Court not to interfere with the discretion exercised by lower appellate Court.

An appeal was pending before the District Judge, Coimbatore. One of the appellants died. After a delay of two years the legal representatives of the deceased appellant filed interlocutory applications to set aside abatement, to excuse delay and to come on record as legal representatives. These applications were allowed by the lower appellate Court.

This was challenged in revision.

Held, 'sufficient cause' in section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice where no negligence or inaction or want of *bona fides* is imputable to the appellant. What constitutes sufficient cause cannot be laid down by hard and fast rules. It must be determined by a reference to the circumstances of each particular case. The discretion given by the Limitation Act should not be defined and crystallised so as to convert a discretionary matter into a rigid rule of law. Apart from this aspect of the case, the appellate Court had used its discretion and had come to the conclusion that the delay had to be excused. When once the Court before which such an application was filed was satisfied that there was sufficient cause for the delay, the decision of that authority in such a discretional matter should not be questioned before the High Court. [*Para.* 1.]

*C.R.P. Nos. 3004 to 3006 of 1973.

18th July, 1975.

The discretion exercised by the Court below could not be interfered with in the revisional jurisdiction. [*Para*. 2.]

Petition under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the District Judge, Coimbatore, dated 9th September, 1973 and made in I.A. Nos. 82, 83 and 84 of 1973 respectively in A.S. No. 358 of 1969 (O.S. No. 23 of 1967, Sub-Court, Nilgiris).

R. Ramalingam Pillai, for Petitioner.

A. K. Sreeraman, for Respondents.

The Court made the following

ORDER.—These civil revision petitions arise out of I. A. Nos. 82, 83 and 84 of 1973 in A. S. No. 358 of 1969 on the file of the District Judge, Coimbatore. The said interlocutory applications are for excusing the delay in seeking to set aside the order of abatement of the appeal against the deceased third appellant, to set aside the abatement and to bring on record the legal representatives of the third appellant in the appeal as appellants 14 to 16. There was a delay of more than two years in filing this petition. The legal representatives now want to come on record are the sons and daughter of the third appellant in A S. No. 358 of 1969. Only in September, 1972 when the appeal was posted for hearing the legal representatives of the third appellant met the Advocate and found out that it is necessary to file an application to bring them on record in the place of the third appellant, their father. Apart from the third appellant, there are as many as 12 appellants in the main appeal and as such any abatement will be only as against the legal representatives of the third appellant in the appeal. Apart from the ignorance of law which is said to be not an excuse for such a petition, the petitioners in the interlocutory applications, even before the hearing of the appeal, made the application. As I have stated already, the other appellants are on record and the appeal as such will be proceeded with even if the respondents herein are not brought on record. "Sufficient cause" should receive a liberal construction so as to advance substantial justice where no negligence or inaction or want of *bona fide* is imputable to the appellant. What constitutes sufficient cause cannot be laid down by hard and fast rules. It must be determined by a reference to the circumstances of each particular case. The discretion given by the Limitation Act should not be defined and crystalised so as to convert a discretionary matter into a rigid rule of law. Apart from this aspect of the case, the appellate Court has used its discretion and has come to the conclusion that the delay has to be excused. When once the Court before which such an application was filed was satisfied that there was sufficient cause for the delay, the decision of that authority in such a discretional matter should not be questioned before this Court.

2. So far as the present case is concerned, Mr. Ramalingam Pillai, the learned counsel for the petitioner in these civil revision petitions cited a number of decisions wherein it is stated that ignorance of law cannot be an excuse to condone the delay in filing such petitions. Those are all cases where the Court before which such applications were filed rejected them and as such both the appellate Court and the revisional Court in some cases confirmed the order of the Court of the first instance. Thus it is clear that the discretion used by the Court below cannot be interfered with in the revisional jurisdiction.

3. From the facts of the case, I am convinced that the respondents in the civil revision petition cannot be denied the right to agitate the appeal inasmuch as the appeal will not get abated since there are more than 12 appellants in the appeal. Further in the interests of justice and in keeping with the convention, the High Court will not interfere in such discretional matters. The civil revision petitions are dismissed. No costs.

S.J. —— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*S. Suryamurthy, J.*

Govinda Naicker .. *Petitioner.**

Constitution of India (1950), *Article* 227,—*Criminal Procedure Code*, 1973 (*II of* 1974), *section* 397 (3)—*Application to Sessions Judge under section* 397 *dismissed—Application to High Court under Article* 227 *of the Constitution—Whether lies—Scope of Article* 227.

There is in fact no conflict between the provisions of Article 227 of the Constitution of India and sub-section (3) of section 397, Criminal Procedure Code. Under Article 227 of the Constitution the High Court exercises supertintendence over all Courts and Tribunals and has the power to interfere and to see that the Courts and Tribunals exercise their functions within the limits of their authority. Under the Article the High Court has a supervisory and an appellate jurisdiction and considers the area of the inferior jurisdiction and the qualifications and conditions of its exercise. An error of law apparent on the face of the record is also subject to correction by the High Court exercising its powers under the Article. However this power does not justify an interference with concurrent findings of fact. When exercising its powers under section 397, Criminal Procedure Code, the High Court can consider the correctness, legality or propriety of any pending, sentence or order, recorded or passed, and the regularity of any proceedings of such inferior Court. There is thus, no conflict real or apparent between the provisions of section 397, Criminal Procedure Code and Article 227 of the Constitution. [*Para.* 4.]

Petition under Article 227 of the Constitution of India and under section 482, Criminal Procedure Code, praying the High Court to revise the order made in Criminal Revision Petition 10 of 1974 dated 25th April, 1975 by the Sessions Judge, Vellore (C.A. No. 206 of 1974 on the file of the Chief Judicial Magistrate, Vellore) C.C. No. 848 of 1974 on the file of the Judicial Second Class Magistrate, Ambur).

* Cr.R.C. Sr. No. 6156 of 1975.

4th June, 1975.

K.N. Balasubramaniam, for Petitioner.

Public Prosecutor No. 4 for State.

The Court made the following

ORDER.—This is a petition under section 482, Criminal Procedure Code, and Article 227 of the Constitution of India against the order made in Criminal Revision Petition No. 10 of 1974 dated 25th April, 1975 by the Sessions Judge, Vellore, confirming the sentence made in C.A.No. 206 of 1974 by the Chief Judicial Magistrate, Vellore, confirming the sentence made in C.C.No.848 of 1974 by the Judicial Second Class Magistrate, Ambur.

2. The question to be considered is whether a revision is maintainable under Article 227 of the Constitution of India, and section 482 of Criminal Procedure Code, in view of the provisions of section 397 (3), Criminal Procedure Code.

3. As an application under section 397, Criminal Procedure Code, made to the Sessions Judge of Vellore has been dismissed and as sub-section (3) of section 397 of the Criminal Procedure Code, is a bar to a further application under section 397, Criminal Procedure Code, being made to this Court, the question whether sub-section 3 of section 393, Criminal Procedure Code, is repugnant to the provisions of Article 227 of the Constitution and therefore void has been raised by the learned counsel for the petitioner.

4. There is in fact no conflict between the provisions of Article 227 of the Constitution of India and sub-section (3) of section 397, Criminal Procedure Code, under Article 227 of the Constitution, this Court exercises superintendence over all Courts and tribunals and has the power to interfere and to see that the Courts and tribunals exercise their functions within the limits of their authority. Under Article 227 of the Constitution, this Court exercises a supervisory and not an appellate jurisdiction, and considers the area of the inferior jurisdiction and the qualifications and conditions of its exercise. An error of law apparent on the face of the record is also subject to correction by this Court exercising its

powers under Article 227 of the Constitution. However, this power does not justify an interference with concurrent findings of fact. When exercising its powers under section 397, Criminal Procedure Code, this Court can consider the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and the regularity of any proceedings of such inferior Court. There is thus no conflict, real or apparent, between the provisions of section 397, Criminal Procedure Code, and Article 227 of the Constitution. In the instant case there is no error of law apparent on the face of the record. Whether there was a wrongful exercise of jurisdiction also does not arise for consideration.

5. Hence this petition is rejected.

S.J. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*K. Veeraswami, CJ.* and *S. Natarajan, J.*

Hepzibah Annathai Rangachari, represented by her power of Attorney Agent, G. Paul Vivekananda .. *Appellant**

v.

K. Ananthalakshmi Rangachari .. *Respondent.*

(A) *Banker and Customer—Monies in Bank—Either or survivor or joint accounts—Claim by the survivor—Letters of Administration—Whether necessary.*

(B) *Indian Succession Act (XXXIX of* 1925), *Chapter II, sections* 254 *to* 257*—Valuation—Affidavit of assets.*

(C) *Letters Patent (Madras), Clause* 15.

Normally, when Letters of Administration are applied for, as envisaged by the provisions of Chapter II of the Indian Succession Act, the entirety of the assets of the deceased should be disclosed in the affidavit of assets which will count for valuation for purposes of Court-fee. Certain exceptions are provided to this rule by sections 254 to 257 of the Indian Succession Act. Where in a case of a joint account in a Bank and the amount is payable to either or survivor, the nature of the case requires that it is treated as an exception to the general rule. On that view it may not even be necessary to obtain Letters of Administration because the survivor would be entitled to draw the amount in her own right. [*Para.* 2.]

If the Bankers insist upon Letters of Administration, the Court is not barred from granting Letters as a formality to enable the person to meet the demands of the Banker in order to draw the amount. [*Para.* 3.]

What a final order would be in a case, will depend not merely on the abstract proposition of law but also on the circumstances of each case. Cases on this part are legion. [*Para.* 4.]

Cases referred to ;

Parthasarathi Naidu, In re, (1955) 1 M.L.J. 542 : 68 L.W. 489 : A.I.R. 1955 Mad. 411; *Panickar* v. *T. N. & Q. Bank by its Official Liquidators*, (1942) 1 M.L.J. 161: 55 L.W. 252 : 203 I.C. 588 : A.I.R. 1942 Mad. 351.

Appeal under Clause 15, Letters Patent, against the Judgment and Order of Paul, J., dated 19th April, 1973 in Application 466 of 1973 in O.S. No. 2 of 1973.

P. H. Pandian, for Appellant.

V. C. Srikumar and *V. C. Rangadurai*, for Respondent.

The Order of the Court was made by

Veeraswami, C. J.—The appeal arises from an order of Paul, J., made in an application of the appellant for grant of Letters of Administration. She claimed that she was the wife of one S. Rangachariar, who died at Madras leaving a will, dated 14th January, 1964. He had an account No. 3188 in the United Commercial Bank, Purasawalkam, jointly with the appellant and her daughter one Rebecca. Also, she claimed the death benefit payable by the Arabian Oil Co. In respect of the two items, she applied for Letters of Administration valuing them together at Rs. 59,793-76. The respondent claiming to be the senior wife of the deceased,

* O.S.A. No. 60 of 1973.

18*th June*, 1974.

appeared on the scene at a later stage and contended that the assets left by Rangachari amounted to much more than the value mentioned in the affidavit of assets, and that all the assets of the deceased should be valued and brought into the affidavit of assets of the deceased in order that letters of Administration might be granted subject to other conditions, if any. This objection prevailed with Paul, J., except in respect of the property covered by a sale deed which stood in the name of the appellant.

2. Normally, when Letters of Administration are applied for, as envisaged by the provisions of Chapter II of the Indian Succession Act, the entirety of the assets of the deceased should be disclosed in the affidavit of assets which will count for valuation for purposes of Court-fee. That this is so, was held in *Parthasarathi Naidu, In re*[1]. As pointed out in that decision, the rule has exceptions as provided by sections 254 to 257. Though the appellant sought to invoke section 254 (1), in our opinion the real exception applicable to this case is what is contained in section 255. Where it is a case of joint account in a Bank and the amount is payable to either or survivor, the nature of the case requires that it is treated as an exception to the general rule we mentioned. This is because, though the will in this case devised the entire assets of the deceased testator in favour of the appellant, in as much as the account was joint and the amount standing to its credit was payable to either or survivor. the appellant, as between the Bank and herself would be entitled to draw the same in her own right. On that view, it may not even be necessary to obtain Letters of Administration, for, there is in the case little to administer, and,as we mentioned, her right to draw the amount can be independently of the will. In the case of payment of the death benefit, that again as we take it, was payable to the wife and though it may not stand on the same footing as the joint account aforesaid, still her right to draw the money as death benefit would likewise arise even independent of the will. That being, so, we are inclined to think that this is a case where Letters of Administration are totally unnecessary for the appellant so far as the above two items are concerned.

3. It is, however, strenuously contended before us that, even on the footing of the amount payable to either or survivor, since there is no presumption in favour, of the wife, all that could be said is that there would be a resulting trust in favour of the surviving wife and that, as the respondent is the senior wife of the deceased, she would be entitled to share that amount. This argument, as we think, is mixed up with the real issue, namely, whether the appellant could invoke any of the exceptions to the general rule. That question does not involve consideration and disposal of the rights of the contesting claimants in respect of the two amounts. From the standpoint of administration and the requirement of mentioning the items the deceased left in the affidavit of assets, which will eventually bear on Court-fee, we are of opinion that at this stage substantive rights of the contending claimants do not fall to be decided. All that we are concerned is to see whether the nature of the case requires application of the exception contained in section 255. We think, that, in this case, the nature of the case being such, namely, a joint account payable to either or survivor, the surviving wife is entitled to draw the money in her own right. Apart from that she is not obliged even to apply for Letters of Administration. But, since the Bankers, as we are told, had insisted upon such Letters she had applied. In such a case, the Court is not barred from granting Letters as a formality to enable the appellant to meet the demands of the Bankers in order to draw the amount. As we opined, earlier, the consideration will apply to the other claim on account of the death benefit of the husband.

4. Learned counsel for the respondent strongly relied on *In the matter of* Varadaraja Mudaliar (*sic*) *Panickar* v. *T. N. & Q. Bank by its Official Liquidators*[1] to contend that in the case of either or survivor account the money belonged to the estate

1. 68 L.W. 489 : (1955) 1 M.L.J. 542 : A.I.R. 1955 Mad. 411.

1. 55 L.W. 252 : (1942) 1 M.L.J. 161 : 203 I.C. 588: A.I.R. 1942 Mad. 351.

of the husband, and that being so, no exception could be applied to the general rule that the entire assets should be disclosed in the affidavit of assets. But, this contention is only begging the question. The authority cited does not go beyond that we have already mentioned that in case of such account, the survivor may hold the proceeds of the account in trust, if there are other valid claimants to the same. But that is entirely a matter different from, as we said, what we are concerned.

5. Also it is contended for the respondent that the order of Paul, J. is not a final one and as such the appeal did not lie. What a final order would be in a case, will depend not merely on the abstract proposition of law but also the circumstances of each case. Cases on this part are legion. Suffice it to say that in the instant case Paul, J.'s order was final, because there was nothing more to be considered so far as the main petition for granting of Letters of Administration is concerned. As a matter of fact the appellant had once obtained such Letters, but it happened to be in the absence of the respondent at whose instance the earlier order had been set aside. The objection as to the maintainability of the appeal cannot therefore, be accepted.

6. We accordingly allow the appeal. No costs.

R.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*N. Krishnaswamy Reddy, J.*

Paranjothi Udayar and others .. *Petitioners**

v.

State and others .. *Respondents.*

(A) *Criminal Procedure Code*, 1973 (*II of* 1974), *sections* 202, 208 *and* 484—*Repeal and savings—Chapter XVIII of the old Code—Offence triable by a Court of session or High Court—Pendency of inquiry—New Code coming into force—Inquiry to be dealt with and disposed of under the new Code.*

On a private complaint filed against the petitioners on 5th February, 1974 alleging that they trespassed into the land and unlawfully cut and removed the paddy crops therein thereby committing offence falling under sections 147, 148, 447, 379 and 506 (2), Indian Penal Code, the District Magistrate took the case on file under section 395 read with section 398, Indian Penal Code, after recording the sworn statement of the complainant and transferred the case to the file of the Judicial Second Class Magistrate. The Judicial Second Class Magistrate took the case on file and issued summons to the accused and on the appearance of all the accused; a copy of the complaint was furnished to them and the case was adjourned to 14th March, 1974, for the examination of the prosecution witnesses on that date, after recording the undertaking of the complainant to bring the witnesses on that date. The case was then finally adjourned to 10th April, 1974 and on that date when the accused were present, the Magistrate passed orders stating that the complaint disclosed offences under section 395 and 395 read with 397, Indian Penal Code, which are triable by Court of sessions, and committed them to take their trial in the Court of sessions under section 209, Criminal Procedure Code. On a petition filed by the accused to quash the order of committal,

Held, The committal proceedings are liable to be quashed since the Judicial

* Crl.Mis.P. Nos. 2841 and 3130 of 1974.
25*th April*, 1975.

Second Class Magistrate failed to follow the procedure provided under sections 202 and 208 of the new Code in view of the proviso to section 484 of the Code, dealing with savings and repeal. [*Paras.* 20 *and* 22.]

Section 484 of the Code generally exempts the application of the provisions of the Code in all appeals, applications, trials, inquiries etc., and such appeals etc., shall be disposed of, continued etc., in accordance with the provisions of the Code of Criminal Procedure, 1898, as in force immediately before such commencement, as if the new Code had not come into force. [*Para.* 19.]

But the proviso makes it clear that every inquiry under Chapter XVIII the old Code, which was pending at the commencement of the new Code, shall be dealt with and disposed of in accordance with the provisions of the new Code. Chapter XVIII of the old Code deals with inquiry into cases triable by the Court of sessions or High Court. [*Para.* 19.]

If once the new Code is made to apply to any proceedings, such proceedings must be dealt with irrespective of the stage of such proceedings as if such proceeding was instituted after the new Code came into force and deal and dispose it of under the provisions of the new Code. [*Para.* 20.]

(B) *Criminal Procedure Code,* 1973 *(II of* 1974)*,sections* 202, 208—*Scope—Private complaint—Offence triable by a Court of session—Procedure to be adopted by the Magistrate—Recording of statement of witnesses—Furnishing of such statements and documents to accused—Mandatory.*

Section 202 (2) of the Code gives a discretion to the Magistrate to take evidence of witnesses on oath, before the issue of process, for the purpose of finding out whether there was any case for enquiry or trial. But under the proviso to section 202 (2) no such discretion is given in the case of offences triable exclusively by the Court of sessions, and in such cases it is mandatory that the Magistrate shall require the complainant to produce all his witnesses and examine them on oath. [*Para.* 11.]

Under section 203 of the Code, even in cases triable exclusively by the Court of session, the Magistrate, if he is of opinion, after examining the witnesses, that there are no sufficient grounds for proceedings shall dismiss the complaint. [*Para.* 12.]

Section 208 of the Code provides that in a case instituted otherwise than on a police report, if it appears to the Magistrate issuing process under section 204 that the offence is triable exclusively by the Court of session, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each: (*i*) the statements recorded under section 200 or section 202, of all persons examined by the Magistrate; (*ii*) the statements and confessions, if any, recorded under section 161 or 164; and (*iii*) any documents produced before the Magistrate on which the prosecution proposes to rely. [*Para.* 17.]

A reading of the proviso to clause (2) of section 202 together with section 208 (*i*) would clearly show that on a complaint before the Magistrate where it appears that the offence committed is triable exclusively by a Court of Session, the statements of all the witnesses produced by the complainant must be recorded and the copies of such statements of the witnesses so recorded and documents relied on by the prosecution shall be furnished to the accused free of cost. Thus the recording of the statements of witnesses under the proviso to clause (2) of section 202 and the furnishing of copies of such statements as provided under section 208 (*i*) are mandatory. [*Para.* 17]

Held on facts, the Judicial Second Class Magistrate on receiving the complaint, by transfer, in accordance with the provisions of Chapter XVIII of the old Code, took the complaint on file and adjourned the case for the examination of the prosecution witnesses. As the new Code, came into force in the meanwhile, under the proviso to section 484 of the new Code, the Magistrate ought to have dealt with and disposed it of as if the inquiry commenced after the new Code came into force. [*Para.* 20.]

Case referred to :—

S. J. Abdulla and others v. *State by Deputy Commercial Tax Officer, Sriperumbudur,* Crl. M.P. No. 2478 of 1974.

Crl. M. P. 2841 *of* 1974:—

Petition praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to transfer the case S. C. No. 67 of 1974 from the file of the Court of the Assistant Sessions Judge, Ramanathapuram at Devakottai, to the file of any other Court of competent jurisdiction within the District or at Madurai.

Crl. M. P. 3130 *of* 1974 :—

Petition praying that for the reasons stated therein the High Court will be pleased to quash the order of committal made in P. R. C. No. 3 of 1974 on the file of the Court of the Judicial Second Class Magistrate, Karaikudi.

C. K. Venkatanarasimhan, for Petitioners.

Public Prosecutor No.IV and *R. Santhanam,* for Respondents.

The Court made the following

ORDER.—Cr. M. P. No. 2841 of 1974 has been filed by the petitioners, namely accused 1 to 4, 7, 9, 10 to 14, 17, 18, 20, for transfer of S. C. No. 67 of 1974 from the file of Assistant Sessions Judge, Ramanathapuram at Devakottai, to the file of any other Court of competent jurisdiction within the District or at Madurai. Cr. M. P. No. 3130 of 1974 has been filed to quash the order of committal made in P.R.C. No. 3 of 1974 on the file of the Court of Judicial Second Class Magistrate, Karaikudi.

2. I shall first take up Cr. M. P. No. 313 of 1974. This petition has been filed by the aforesaid accused to quash the committal proceedings on the main ground that the Judicial Second Class Magistrate, Karaikudi, has not followed the procedure laid down under (the new Code of Criminal Procedure, hereinafter called "the Code") in cases of private complaints and, therefore, the committal was illegal.

3. The facts of the case are these : One Muthana Kone, the second respondent herein, filed a private complaint before the District Magistrate, Devakottai on 5th February, 1974 alleging that the petitioners herein and six others trespassed into his land at Sattanendalpatti village on 30th January, 1974 and unlawfully cut and removed his paddy crops therein and committed offences falling under sections 147, 148, 447, 379 and 506 (2), Indian Penal Code. The learned District Magistrate took the case on file under section 395 read with section 398, Indian Penal Code, after recording the sworn statement of the complaint and transferred the case to the file of the Judicial Second Class Magistrate, Karaikudi.

4. The learned Judicial Second Class Magistrate, Karaikudi took the case on file as P. R. C. No. 3 of 1974 and issued summons to the petitioners and the other accused and on the appearance of all the accused, a copy of the complaint was furnished to them and the case was adjourned for the examination of the prosecution witnesses to 14th March, 1974, after recording the undertaking of the second respondent-complainant to bring the witnesses on that date. The case was again adjourned to 20th March, 1974, for the examination of the prosecution witnesses on the undertaking given by the second respondent-complaint to produce the witnesses. Again, from 20th March, 1974, the case was adjourned to 1st April, 1974 for examination of the prosecution witnesses. The case was then adjourned to 10th April, 1974 and on that date when the petitioners and the other accused were present, the Magistrate passed orders stating that the complaint disclosed offences under section 395 and 395 read with 397, Indian Penal Code, which are triable by Court of sessions, and committed them to take their trial in the Court of sessions of Ramanathapuram Division at Madurai, under section 209, Criminal Procedure Code.

5. Though the case was taken on file by both the District Magistrate and the Judicial Second Class Magistrate, before the Code came into force, when the committal order was passed which was on 10th April, 1974 the Code had come into force, which was on 1st April, 1974. This order was presumably made by the learned Magistrate as he understood that the new provisions of the Code had given discretion to him to commit the accused without examining the witnesses even on a private complaint.

6. It is urged by the learned counsel for the petitioner Sri C. K. Venkatanara-

simhan that the learned Magistrate ought to have examined the witnesses and furnished copies of the statements and other documents on which the second respondent-complainant relied before the order of committal was passed under section 209, Criminal Procedure Code, and that the Magistrate had erred in not following the mandatory provision of sections 202 and 208, Criminal Procedure Code. It is, therefore, necessary to consider the provisions of the Code in respect of the order of committal relating to private complaints.

7. Chapter XV of the Code, which contains four sections, namely, sections 200 to 203, deals with complaints to Magistrate.

8. Under section 200 of the Code, a Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate, excepting in cases where the complainant is a public servant and the complaint is in relation to the discharge of his official duties and where the Magistrate makes over the case for inquiry or trial to another Magistrate under section 192.

9. Under section 201, if the Magistrate is not competent to take cognizance of the offence, he shall return the complaint, if it is in writing, for presentation to the proper Court with an endorsement to that effect and if the complaint is not in writing, direct the complainant to the proper Court.

10. Now we come to section 202 of the Code which is relevant for our discussion. It reads as follows :

> " *Postponement of issue of process.*—(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under section 192, may, if he think fit, postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a Police Officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding :
>
> Provided that no such direction for investigation shall be made :—
>
> (*a*) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of session ; or
>
> (*b*) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under section 200.
>
> (2) In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath :
>
> Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of sessions, he shall call upon the complainant to produce all his witnesses and examine them on oath.
>
> (3) If an investigation under sub-section is made by a person not being a Police Officer, he shall have for that investigation all the powers conferred by this Code on an officer incharge of a Police Station except the power to arrest without warrant."

11. Thus, we see that under clause (1) of section 202, the Magistrate on receipt of a complaint of an offence of which he is authorised to take cognizance, postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a Police Officer for the purpose of deciding whether or not there is sufficient ground for proceeding. The proviso to clause (1) clearly states that no direction for investigation as provided under that clause shall be made where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of session. We are not concerned with Proviso (*b*) to Clause (1) of section 202 in the instant case. Clause (2) of section 202 gives a discretion to the Magistrate to take evidence of witnesses on oath before the issue of process for the purpose of finding out whether there was any case for enquiry or trial. The Proviso to

Clause (2) is very important as it lays down a special procedure in respect of the offences complained of, triable exclusively by the Court of session. If it is an offence other than the offences triable exclusively by the Court of session, discretion is given to the concerned Magistrate under Clause (2) to take evidence of witnesses on oath, if he (Magistrate) thinks fit. But the proviso does not give such a discretion to the Magistrate in respect of an offence triable exclusively by the Court of session, and in such cases, the Proviso makes it mandatory by the following words "he (the concerned Magistrate) *shall* call upon the complainant to produce all his witnesses and examine them on oath". Thus, discretion is given to the concerned Magistrate to examine witnesses on oath in respect of offences. But once it appears to the Magistrate that the offence complained of is triable exclusively by the Court of session, he shall require the complainant to produce all his witnesses and examine them on oath.

12. Now, we come to section 203 of the Code. Under this section, if once the Magistrate has recorded evidence of the witnesses either in his discretion under clause (2) or has recorded the evidence of all the witnesses produced by the complainant as provided under the Proviso in respect of offences triable exclusively by the Court of session and he (Magistrate) is of opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint after briefly recording the reasons for so doing. This would show that in private complaints, the Magistrate even in cases triable exclusively by the Court of session, after examining the witnesses as per the proviso to clause (2), if he is of opinion that there are no sufficient grounds for proceeding, shall dismiss the complaint. The disposal of the complaint under section 203 of the Code applies to even the offences complained of, which appear to the Magistrate are triable exclusively by the Court of session, unlike a case instituted on a police report. Under the Code, a discretion is given to the Magistrate to dismiss the complaint even if the complaint discloses offences triable exclusively by a Court of session if such Magistrate is of opinion that there was no sufficient ground for committal.

13. We will again go back to the proviso to clause (2) of section 202. I have already noted that under this proviso, the Magistrate shall call upon the complainant to produce all his witnesses and examine them on oath, if it appears to him that the offence complained of is triable exclusively by the Court of session. It is mandatory and compulsory on the part of the Magistrate to examine all the witnesses produced by the complainant. There may be cases where the complainant has not produced the witnesses and therefore, in such cases, the examination of such witnesses on oath does not arise.

14. The next stage will arise when the complaint is not dismissed under section 203, Criminal Procedure Code, and where it appears that the offences alleged therein are exclusively triable by the Court of session.

15. Chapter XVI of the Code deals with commencement of proceedings before Magistrate (sections 204 to 210). This Chapter deals with commencement of proceedings before the Magistrate in respect of the offences triable by such Magistrate including petty offences under section 206 of the Code and the procedure to be followed in respect of committal on a police report (section 207) and the procedure to be followed in other cases triable by a Court of session, other than instituted on a police report (section 208).

16. Under section 207, the Magistrate shall without delay furnish to the accused, free of cost, in a case where the proceeding has been instituted on a police report, a copy of each of the following :

(*i*) the police report ;

(*ii*) the first information report recorded under section 154 ;

(*iii*) the statements recorded under sub-section (3) of section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under sub-section (6) of section 173;

(*iv*) the confessions and statements, if any, recorded under section 164 ; and

(v) any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub-section (5) of section 173.

17. The object of furnishing copies to the accused, in cases instituted on police report, is to facilitate the accused to prepare his defence in advance by knowing what are the materials by which the prosecution seeks to prove its case against him. In respect of a private complaint where the offences appear to be exclusively triable by a Court of session, the documents mentioned in section 207 will not be available to the accused as all those documents come into existence during the course of investigation by the police. In this background, we have to consider the scope and object of section 208 of the Code which runs as follows :

> " *Supply of copies of statements and documents to accused in other cases triable by Court of session*—Where, in a case instituted otherwise than on a police report, it appears to the Magistrate issuing process under section 204 that the offence is triable exclusively by the Court of Session, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following:
>
> (i) the statements recorded under section 200 or section 202, of all persons examined by the Magistrate.
>
> (ii) the statements and confession, if any recorded under section 161 or section 164.
>
> (iii) any documents produced before the Magistrate on which the prosecution proposes to rely :
>
> Provided that if the Magistrate is satisfied that any such document is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court. "

This section provides that where in a case instituted otherwise than on a police report, it appears to the Magistrate issuing process under section 204 that the offence is triable exclusively by the Court of session, the Magistrate shall without delay furnish to the accused free of cost, a copy of each of (i) the statements recorded under section 200 or section 202, of all persons examined by the Magistrate; (ii) the statements and confessions, if any, recorded under section 161 or 164 ; and (iii) any documents produced before the Magistrate on which the prosecution proposes to rely.

A reading of the proviso to clause (2) of section 202 together with section 208 (i) would clearly show that on a complaint before the Magistrate where it appears that the offence committed is triable exclusively by a Court of Session, the statements of all the witnesses produced by the complainant must be recorded and the copies of such statements of all the witnesses so recorded shall be furnished to the accused free of cost. Similarly a copy of any statement recorded by the Magistrate under section 200 of the Code shall also be furnished to the accused. Besides the copies of the statements of the witnesses and the statements recorded under section 200, this section also provides for the furnishing of the copies of the statements and confessions, if any, recorded under section 161 or section 164 and any other documents produced before the Magistrate, on which the prosecution proposes to rely. Thus, it is seen that the recording of the statements of witnesses on oath as provided under the Proviso to clause (2) of section 202 and the furnishing of copies of such statements as provided under section 208 (i) are mandatory. In cases instituted on a police report, the accused will have the benefit of obtaining the copies of the statements of witnesses recorded by the police. In cases instituted other than on a police report, the Legislature in its wisdom has thought of providing the same facility and benefit to the accused and, therefore, the examination of the witnesses by the Magistrate in a case exclusively triable by a Court of session, was made obligatory, so that the accused may have the copies of such statements and other documents, if any, mentioned in Clauses (ii) and (iii) of section 208 furnished to him and have the benefit of preparing his defence as an accused in a police case will have.

The Magistrate after having furnished copies as required under sections 207 and 208, as the case may be, shall commit

the accused to the Court of Session under section 209.

18. In the instant case, the Magistrate has not examined any witness as required under the Proviso to clause (2) of section 202 of the Code as he (Magistrate) thought that this was a case instituted before the Code came into force and it was not necessary for him to follow the provisions of the Code and, therefore, without following the provisions, merely committed the accused to Sessions as is done in cases instituted on a police report.

19. The question that arises now is whether the Magistrate was right in having ignored to follow the procedure provided under the new Code on the ground that the complaint was filed earlier to the Code coming into force. In other words, he seems to be of the view that he has to continue from the stage at which the case stood on the day when the Code came into force. It is, therefore, necessary to consider the scope of section 484 of the Code which deals with repeal and savings. Section 484 runs thus :

> " *Repeal and savings* .—(1) The Code of Criminal Procedure, 1898, is hereby repealed.
>
> (2) Notwithstanding such repeal—
>
> (*a*) if, immediately before the date on which this Code comes into force, there is any appeal, application, trial inquiry or investigation pending, then, such appeal, application, trial, inquiry or investigation shall be disposed of, continued, held or made, as the case may be, in accordance with the provisions of the Code of Criminal Procedure, 1898, as in force immediately before such commencement (hereinafter referred to as the old Code), as if this Code had not come into force:
>
> Provided that every inquiry under Chapter XVIII of the Old Code, which is pending at the commencement of this Code, shall be dealt with and disposed of in accordance with the provisions of this Code.
>
> ....".

Clauses (2) (*b*) and (2) (*c*) are not relevant for our discussion. This section generally exempts the application of the provisions of the Code in all appeals, applications, trials, inquiries or investigations pending and provide that such appeals, applications, trials, inquiries or investigations shall be disposed of, continued, held or made, as the case may be, in accordance with the provision of the Code of Criminal Procedure, 1898, as in force immediately before such commencement, as if this Code had not come into force. But the proviso makes it clear that every inquiry under Chapter XVIII of the Old Code, which was pending at the commencement of this Code shall be dealt with and disposed of in accordance with the provisions of this Code. Chapter XVIII of the old Code deals with inquiry into cases triable by the Court of session or High Court.

20. The complaint in the instant case was presented to the District Magistrate who after consideration transferred the same to the Magistrate as it appeared to him that the complaint disclosed offences triable exclusively by the Court of Session. The Judicial Second Class Magistrate, on receiving the complaint by transfer, in accordance with the provisions of Chapter XVIII of the old Code, took the complaint on file and adjourned the case for the examination of the prosecution witnesses ; as the new Code came into force on 1st April, 1974, he did not follow the procedure under the old Code—in my opinion, rightly—as the Proviso to section 484 (2) (*a*) has clearly stated that every inquiry under Chapter XVIII of the old Code, which is pending at the commencement of this Code, shall be dealt with and disposed of in accordance with the provisions of this Code. But, however, the Magistrate has fallen into an error in not following the provisions of the new Code. The proviso clearly states that at whatever stage the inquiry was pending at the commencement of the Code under Chapter XVIII, it must be dealt with and disposed of as if such inquiry commenced after the new Code came into force. In other words, if once the new Code is made to apply to any proceeding such proceeding must be dealt with irrespective of the stage of

such proceeding as if such proceeding was instituted after the new Code came into force, and deal and dispose it of under the provisions of the new Code. If the Proviso is interpreted otherwise, it will lead to anomaly. If it is construed that the inquiry under the old Code will be valid upto the stage till the new Code came into force and that thereafter the new Code will apply, it would mean that in the same inquiry, both the old Code and the new Code apply at two different stages. This cannot be the object of the Legislature. Either the old Code will apply *in toto* as provided in clause (2) of section 484 or the new Code will apply *in toto* in respect of Chapter XVIII as provided under the Proviso to clause (2) (*a*) of section 484. There cannot by any *via media*. I am, therefore, of the view that the Judicial Second Class Magistrate must have followed the procedure provided under the new Code, which I have discussed fully in the paragraphs supra, before taking further action.

21. An unreported decision of Paul, J., in *S.J. Abdulla and others* v. *State by Deputy Commercial Tax Officer, Sriperumbudur*[1] was brought to my notice. The learned Judge has clearly found in the following terms while interpreting the scope of the Proviso to section 484 (2) (*a*) :

> " Irrespective of the stage which the committal enquiry reached, the committing Magistrate must stop further enquiry under the old Code and proceed in accordance with the provisions of the new Code ".

I agree with this observation, but with the modification that the new Code will apply *in toto* and that the enquiry under Chapter XVIII of the old Code, pending at the commencement of the new Code is completely wiped out and the provisions of the new Code will apply as if the enquiry started after the new Code came into force.

22. In the result the committal proceeding are quashed and Criminal M.P.No. 3110 of 1974 is allowed. In view of the orders on this petition, no further orders are necessary in the petition for transfer of S.C.No.67 of 1974 namely, Criminal M.P.No.2841 of 1974.

V.S. —— *Petition (M.P. No.* 3110 *of* 1974) *allowed and order of committal quashed.*

1. Crl. M. P. No. 2478 of 1974.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—*T. Ramaprasada Rao, J.*

Mohammed Karimuddin (died) and others .. *Petitioners**

v.

The State of Madras represented by the Special Deputy Collector of Land Acquisition, State Housing Board Schemes, Madras-1 and others .. *Respondents.*

(*A*) *Land Acquisition Act* (*I of* 1894), *section* 48 (1)—*Vacant land belonging to petitioner—Acquisition for public purpose—Notification under section* 4 (1)—*Enquiry—Squatters raising objection—Assurance by Government to the petitioner that the land would be acquired—No award passed—Lapse of nine years—Withdrawal from acquisition on extraneous consideration—Order of withdrawal—Liability to be quashed on* certiorari—*Constitution of India* (1950), *Article* 226.

(*B*) *Natural Justice—Whether violated—Estoppel—Assurance by Government whether amounts to promissory estoppel.*

The law of Eminent Domain enables the State to compulsorily acquire private land. By such a statutory process the owner is deprived of his rights to own property. This he has to suffer in public interest. But what is relevant is that the land acquisition process which contemplates the ultimate taking of possession, necessarily involves a substantial abridgment of the rights of ownership as would amount to deprivation of the owner of his property and consequential damage,

* W.P. No. 2470 of 1969.

21st June, 1974.

as is referred to in section 23 of the Land Acquisition Act. The word ' possession' in section 48 of the Act has to be interpreted liberally and in the above light. No irrefragable test can be laid down as to whether on a furnished hypothesis, the owner is deprived of his property by the land acquisition process beginning from the notification under section 4 (1) and ending with the award enquiry under sections 9 and 10 of the Act. The meaning given to "possession " in the decided cases arising under Article 31 of the Constitution, provides a safe guide for interpreting the word in section 48 (1) of the Land Acquisition Act, which term engulfs within it the expression " substantial deprivation of rights of ownership." [*Para.* 17.]

Acquisition of property is equivalent to substantial deprivation of property rights. An extinguishment of private right in property is possible by objective acts such as physical taking over as well as by acts of omissions and commissions leading to the same effect and resulting in robbing of the owner of the attributes of enjoyment which are annexed to ownership. [*Para.* 18.]

Ordinarily the power of the Government to cancel a notification under section 4 (1) of the Act as also to withdraw lands of which possession was taken for purposes of acquisition has to be conceded both under the General Clauses Act as well as under the express provisions in the Land Acquisition Act. But when the facts in a given case are peculiar and when the principle of promissory estoppel or election is invocable because of such facts and circumstances, a further probe is necessary to find as to in what capacity the State acted when it issued the challenged notification under section 48 (1) of the Land Acquisition Act. [*Para.* 21.]

The power to withdraw a notification, therefore, has to be interpreted *ejusdem generis* with the specific cases. [*Para.* 22.]

It effectively the owner's right to enjoy the property has been prevented for nine years by Government machinery acting to his prejudice and when by such long delay and encouragement given to trespassers there has been a serious impairment of the value of the property and the petitioner's right to enjoy it, then the State is estopped from exercising their statutory powers under section 48 (1) of the Act, on the principle of promissory estoppel. [*Para.* 19.]

Held on facts, that the dominant purpose appeared to be to help the squatters who had trespassed into the land subsequent to the notification to the utter prejudice of the petitioner who was not even consulted in the matter and there was a violation of the principles of natural justice when the State acted as it did. The resultant order has to be removed by issuing the rule under Article 226 of the Constitution. [*Paras.* 22 *and* 23.]

Cases referred to :—

Sivaprakasa Mudaliar v. *State of Madras*, (1963) 2 M.L.J. 376 : A.I.R. 1964 Mad. 115 ; *Subodh Gopal Bose's case*, (1954) S.C.R. 587 : 1954 S.C.J. 127 : 67 L.W. 206: A.I.R. 1954 S.C. 92; *Second Sholapur Mills case*, (1954) S.C.R. 674 : 1954 S.C.J. 175: (1954) 1 M.L.J. 355: A.I.R. 1954 S.C. 119 ; *S. Pratap Singh* v. *The State of Punjab*, (1964) 4 S.C.R. 733 : A.I.R. 1964 S.C. 72 ; *Union of India* v. *Anglo-Afghan Agencies*, (1968) 2 S.C.R. 366: (1968) 2 S.C.J. 889: A.I.R. 1968 S.C. 718 ; *Seth Sat Narain v. Union of India* (C.A. No. 646 of 1964) ; *Vijay Cotton and Oil Mills Limited* v. *The State of Gujarat*, (1969) 2 S.C.R. 60.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the order of the first respondent, dated 3rd June, 1969 and all other connected records on the file of the first Respondent and quash the order in G.O. Ms. No. 226 (Housing), Labour Department, dated 3rd June, 1969 and withdrawal notification published in *Fort St. George Gazette*, dated 11th June, 1969, Part II, section I, page 843, relating to the lands of the petitioners comprised in Survey No. 1/1-A in Arumbakkam, Madras extended Area taluk.

K. K. Venugopal and *J. Kanakaraj* of *M/s. Raj and Raj*, for Petitioners.

The Advocate-General assisted by *T. Sathiadev*, Assistant Government Pleader, *R. Thillai Villalan, S. K. Rajavelu* and *V. Natarajan*, Advocates, for Respondents.

The Court made the following

ORDER.—In this Writ Petition the petitioners seek to quash the order of the 1st respondent in G.O. Ms. No. 226 (Housing), Labour Department, dated 3rd June, 1969 and the consequent notification of withdrawal from acquisition of certain lands of the petitioners under the provisions of the Land Acquisition Act, which notification was published in the *Fort St. George Gazette*, dated 11th June, 1969. The petitioners are the owners of an extent of 15.94 acres of land in Survey No. 1/1-A in Arumbakkam, which is comprised in the Madras extended Area Taluk. The lands are situate on the Madras-Bangalore Trunk Road and near a developed colony known as Shenoynagar and is in the neighbourhood of the well-known colony of Anna Nagar. The 1st petitioner died during the pendency of the Writ Petition and his surviving legal representatives are said to be the 2nd and 3rd petitioners. The original registered owner of the property was late Khader Mohideen Sahib. On 10th August, 1960 a notification under section 4 (1) of the Land Acquisition Act was published notifying the intention to acquire the above lands belonging to Khader Mohideen Sahib for development of the areas in the neighbourhood of Madras City in accordance with the Land Acquisition and Development Schemes of the Government of India. It is not in dispute that the development of the neighbourhood of the Madras City was undertaken by the Tamil Nadu State Housing Board under the powers vested in it by the Tamil Nadu State Housing Board Act. In pursuance of the general policy of framing and executing improvement schemes the acquisition of the above land was undertaken by the State. It is not also equally in dispute that under the improvement scheme which covered the land as above, a provision was made for acquisition of these lands for the avowed purpose of the scheme. If once a scheme is so approved, the same could only be cancelled by the Board as such under section 56 of the Tamil Nadu State Housing Board Act, 1961. The Board is a statutory corporate body having a perpetual succession and a common seal, as delineated in sections 3 and 4 of the above Act. Thus, the notification under section 4 (1) of the Land Acquisition Act, dated 10th August, 1960 was issued in the above background under the normal provisions of the Land Acquisition Act. The notice under section 5-A of the Land Acquisition Act, hereinafter referred to as the Act, was served on the petitioners on 25th August, 1960. The petitioners expressed their desire that their entire land in the survey number, which was of an extent of 19.76 acres may be acquired instead of the major block being split into two by reason of the acquisition. In effect, therefore, the petitioners, by their statement, dated 27th October, 1960, categorically stated that they had no objection for the acquisition of the land in question. The case of the petitioners is that at the time when the notification under section 4 (1) of the Act was published in the Gazette; it was a vacant site as conceded by the Surveyors in the State Housing Board Department. It appears, however, that several persons, who apparently formed themselves into an Association called the N.S.K. Nagar Kudivazhvor Sangam, Arumbakkam, filed statements to the effect that they had built huts on the land in question and that they were organising a Co-operative Society to purchase the land with the help of the Government and they have no objection to the acquisition of the land provided they were given alternative accommodation in case they are compelled to shift from this area. An enquiry under section 5-A of the Act was held and the petitioners state that the occupants as above, though unauthorised, were given a hearing. It is in that context the petitioners alleged that on 7th December, 1960, the Collector of Madras, as the Land Acquisition Officer, sent to the Secretary to Government, Industries, Labour and Co-operation Department, a draft declaration which has to follow the usual enquiry under section 5-A of the Act to the effect that about 301

persons have put up huts in the land and that the hut-dwellers have no objection to the acquisition if the sites in the acquired area are allotted to them or an alternative mode of rehabilitation is thought of by the authorities in the course of execution of the development scheme. The Joint Director of Town Planning, it appears, endorsed that the land in question is absolutely needed for development of the neighbourhood of the Madras City and the scheme has to be proceeded with. On 17th April, 1961, the Board of Revenue, as is seen from the records, recommended the acquisition and this was done after fully apprising themselves of the objections of the hut-dwellers. It was in those circumstances that the draft declaration proposed by the Collector was accepted, and the Government, on 6th December, 1961, approved of the declaration and caused it to be published on that date. It has also been brought out before me that Government specifically informed the State Housing Board that they have accepted the resolutions of the Board and recommended that the present occupiers be given preference in allotment of future sites in the developed area and that the occupants be permitted to continue until alternative sites are provided and that squatters be evicted but bearing in mind that in deserving cases they should be rehabilitated. It should be, however, stated that it was only after the notice under section 4 (1) of the Act was issued, an attempt was made by the statutory authorities to include the names of the occupants in the self-styled N.S.K. Nagar. As by then two years had lapsed, and as there was no award enquiry as it is popularly called, the petitioners through counsel, on 10th April, 1962, complained about the non-passing of the award and called upon the Land Acquisition Officer to take further proceedings and pass an award or drop the acquisition proposal forthwith. On receipt of this notice the appropriate authorities, without dropping the proceedings, intended to proceed with it. On 30th July, 1972, notices under sections 9 (3) and 10 of the Act were served on the petitioners, in which, for the first time, the names of about 260 hut-dwellers were noticed as if they were interested in the land. The petitioners' case is that they had absolutely no interest in the land at any relevant point of time. The petitioners filed their statements seeking for reasonable compensation for their lands. The petitioners obviously were under the impression that after the award enquiry fixed as above on 27th August, 1962, the Land Acquisition Officer would pass the usual award fixing a reasonable compensation for their lands. But nearly two years thereafter, and four years after the date of the notification under section 4 (1) of the Act, a fresh notice under section 5-A of the Act was once again given. Obviously this step was taken by reason of a decision of this Court reported in *Sivaprakasa Mudaliar* v. *State of Madras*[1], in which the petitioners were not parties. The acquisition by then was questioned by owners in the neighbourhood of the petitioners' lands and it was in those circumstances and having regard to certain observations made by this Court in the above case a fresh section 5-A enquiry was directed by this Court in cases where no such enquiry was held. This was, however, misunderstood and a second opportunity to the petitioners by way of a second enquiry under section 5-A was given. Again the petitioners expressed their no objection to the acquisition and pointed out that the other occupants either in the huts or in the houses which by then cropped up unauthorisedly were totally dis-interested in the lands or in the acquisition. The Collector of Madras, again on 27th June, 1964, as the Land Acquisition Officer, while recommending the acquisition and mentioning the existence of 338 huts and 4 tiled houses, stated that the occupants were prepared to have the existing land divided and allotted to them on payment of costs and expressly observed that the objections of the occupants may be overruled as they would be given alternate accommodation by the State Housing Board when they are actually evicted pursuant to the framing and implementation of the improvement scheme. Even thereafter nothing happened. The petitioners once again notified the Land Acquisition Officer

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1. (1963) 2 M.L.J. 376 : A.I.R. 1964 Mad. 115.

that they would be moving the Court for a writ of *mandamus* for the passing of an award if one such is not passed for all that had happened. Curiously enough, in August, 1965, a third enquiry under section 5-A of the Act was held under directions from the Board of Revenue as it was represented that the records were not traceable. In those circumstances the Collector, on 1st October, 1965, sent a third draft declaration to the Government mentioning that by then about 345 occupants had come up in the area and once again recommended that their objections may be overruled and that they could be provided with alternative accommodation by the State Housing Board. At this stage, a second declaration under section 6 was made by the Government and it should therefore be deemed that the Government was satisfied that the acquisition process should go on in spite of the occupants having unauthorisedly come up on the land. Pursuant to this notification under section 6, on 6th April, 1966, once again the award enquiry was taken up and notices under sections 9 (3) and 10 were given not only to the petitioners but also to the occupants as if they were interested persons. On 16th May, 1966, the enquiry was held.

2. It is at this stage that certain special features which loomed very large in the instant case, have to be considered in detail so as to appreciate the contentions of parties. Apparently, in the course of the award enquiry as above, the occupants styling themselves as members of the N.S.K. Nagar Kudivazhvor Sangam, Arumbakkam, made representations to the Land Acquisition Officer. It is seen from the letter of the Special Deputy Collector to the Chairman, State Housing Board, dated 17th May, 1966 that, he gained the impression during the enquiry that the Chairman, State Housing Board, represented to the N. S. K. Nagar Kudivazhvor Sangam that the land acquisition proposals had been dropped. He, therefore, enquired whether he could proceed to pass an award. On 28th May, 1966, the Chairman, State Housing Board, wrote directly to the Secretary to Government, Industries, Labour and Co-operation Department, after referring to the draft declaration proposals and the earlier approval given by the State Government to the same :

> " It has proposed to drop the acquisition of the land in S. No. 1/1-A, Arumbakkam village, now occupied by N. S. K. Nagar............ "

Even in this letter it is not stated that the area which is not occupied by the occupants of N. S. K. Nagar was not required by the State Housing Board for purposes of the improvement scheme. This is followed up by another letter by the Chairman of the State Housing Board referring to the hut-dwellers in the area and expressing its opinion that after careful examination it was considered by it that the land may be excluded from acquisition. The Secretary to Government, on 5th October, 1966, wrote back to the Chairman, State Housing Board, pointing out that the hut-dwellers' objections had already been overruled on the recommendation of the Collector of Madras, and enquired as to how the Chairman, State Housing Board, has now taken a different view and recommended the withdrawal of the acquisition. He asked the Chairman to clarify the position. In this letter, dated 21st December, 1966, the Chairman, State Housing Board, wrote thus :

> " I am to state that *M(I)* and *M(H)* after personal inspection of the area have decided *to leave out the area comprised of N. S. K. Nagar from acquisition.* In pursuance of the above decision *only* I have recommended the exclusion of the land from acquisition."

The italics is mine. Soon thereafter the petitioner filed a Writ Petition for the issue of a writ of *mandamus* to pass an award, but this was dismissed at the admission stage with directions to approach the Government. On 13th March, 1967, the Government issued G.O Ms. No. 925, Housing, to the effect that the Chairman, State Housing Board, recommended that S. No. 1/1-A, Arumbakkam, be excluded from acquisition and it purports to say that on such recommendation and after careful examination the Government decided that the land be excluded from acquisition for

West Madras Neighbourhood Project. The Collector was asked to put up necessary proposals for withdrawal under section 48 (1) of the Land Acquisition Act. No such step was immediately taken either by the Collector of Madras or by the Government. On the other hand, on 21st September, 1967 the Government replied to the petitioner's notice in pursuance of the earlier writ which was dismissed at the admission stage, stating that the question of withdrawal was under consideration. Obviously, therefore, no final decission was taken till then. On 17th November, 1967 a second Writ Petition, (*Mohammed Karimuddin Saheb and two others* v. *State of Madras by the Special Deputy Collector of Land Acquisition, State Housing Board, Schemes, Madras*-1)[1], was filed to pass an award, which was again dismissed at the admission stage with a direction to the Government to dispose of the matter within three months. No action was taken by the Government pursuant to the earlier attitude of theirs. A third Writ Petition, (*Mohammed Karimuddin Saheb and two others* v. *State of Madras represented by Special Deputy Collector of Land Acquisition, State Housing Board, Schemes, Madras*-1)[2], was filed for a similar relief, for a *mandamus* to the appropriate officer to pass an award, as by then every possible enquiry contemplated under the Land Acquisition Act was over. After a full hearing, Kailasam, J., allowed the Writ Petition as the Government did not pursue their earlier vague intention to withdraw even though several opportunities were given by the Court during the hearing. The order in W.P. No. 705 of 1968 has become final as it has not been appealed against. On 29th November, 1968 the petitioner called for compliance of the order of Court. Even then nothing was done. Nearly ten months later an application for contempt was filed and in particular the Land Acquisition Officer was made the respondent as being the contempner. It is only thereafter the impugned notification under section 48 (1) was made and was sought to be published in the Gazette on 11th June, 1969. The contempt application was closed after accepting the apology tendered by the Land Acquisition Officer. It is in the above circumstances that the present writ petition for the issue of a writ of *certiorari* to quash the notification under section 48 (1) of the Land Acquisition Act was filed.

3. The contention of the petitioner is that after all that has happened for nearly nine years subsequent to the first notification under section 4 (1) of the Land Acquisition Act, it cannot be said that possession of the lands was not taken by the Government. Reliance is strongly placed upon the manner in which the land acquisition process was set into motion and how trespassers were encouraged to occupy private land which was by then sequestered under the power of eminent domain of the State. Reference was made to the fact that the first notification under section 4 (1) did not mention any occupant and that it was only in 1962 when notices under sections 9 (3) and 10 were issued in connection with an award enquiry that about 260 trespassers were noted as interested persons in occupation of the land. It was also submitted that having regard to the peculiar facts and circumstances of this case whereby the Town Planning authorities who were a wing of the State, the State Housing Board authorities and the authorities of the Madras Corporation, the latter two being statutory bodies under the immediate supervision and control of the State Government sought to encourage the occupancy of such trespassers by permitting them to put up pucca structures thereon and by spending public money for the improvements of the said colony called N. S. K. Nagar. It was contended that it was through the active support and co-operation of the Government and the statutory bodies under their control the trespassers have gained ground into the land though they conceded in unequivocal terms in the correspondence which I shall presently refer to, that they had absolutely no right, title or interest over the land. In fact, expenditure of public money was incurred as if it was a budgetable item of expenditure and the said budget having been finally approved by the State Government which they reviewed, it creates *inter alia* a situation of promissory estoppel which would not permit the State to

1. W.P. No. 3467 of 1967.
2. W.P. No. 705 of 1968.

resurrect an exhausted power under section 48 of the Land Acquisition Act. Pertinent reference was made to the fact that the Corporation put up public roads and streets and lighted them at public cost and this was all to the knowledge of and with the connivance of the State Government. The petitioner is said to have been deprived of every conceivable right over his property and it is not possible for the Government to invoke section 48 (1) of the Land Acquisition Act and hence the impugned notification is without jurisdiction. Secondly, it was said that the effect of the action of the respondent in withdrawing the acquisition proceedings is that they are taking away private property and practically vesting the same without authority in the trespassers. Though at every conceivable point of time the Collector of Madras, the Chairman, State Housing Board and the Commissioner, Corporation of Madras, including the Directorate of Town Planning were all parties to conferences in which they would not countenance the objection of the trespassers and on the other hand were repeatedly recommending the acquisition of the property, the subject cannot be left to an on-the-spot decision by the executive to leave the area comprised by N. S. K. Nagar from acquisition purely on humanitarian grounds. Though the award was ready to be passed by the Land Acquisition Officer, he did not pass it and this itself is reflective of lack of *bona fides* on the part of the State and its officers. It is only when a writ of *mandamus* is issued and after repeated directions by the Court in various writ petitions that the impugned notification was issued and this itself reflects that the 1st respondent acted hand in glove with the hut-wellers in N. S. K. Nagar. In the judgment of this Court in W.P. No. 705 of 1968 the Court did not agree with the reasons given by the State in not completing the acquisition. There has been a deliberate postponement of the completion of a legal process resulting in an arbitrary and capricious order being passed in the shape of the impugned notification. Even though section 48 (1) envisages a power in the State to withdraw from acquisition a land of which possession has not been taken, yet such a power is not available in the instant case having regard to the circumstances and acts already referred to and in the light of the telling events that happened between 1960 and 1969.

4. Incidentally it pointed out in the supplemental affidavit filed by the petitioner that the lands were not unsuitable for the scheme. As a matter of fact no record has been produced to show that the State Housing Board, in a manner known to law, has given up this scheme and the various limbs including the acquisition of the petitioner's lands for purposes of the said scheme. It is expressly stated that the notification is made with an ulterior motive of benefiting the hut-dwellers and in any event there are no grounds or circumstances upon which the Government could have come to the conclusion that the land was not suitable for the scheme. The said opinion, if any, formed on the spot is not the result of any objective approach or assessment of the relevant materials. Such materials were considered earlier by the State when it made the declaration under section 6 and the present situation, therefore, projects lack of *bona fides* on the part of the authorities. Reliance was placed upon the observations of the Select Committee in paragraph 12 of the report dated 2nd February, 1893 for effecting the change in law and the circumstances under which the power under section 48 could be invoked. It is said in the report that experience has shown that the only occasion on which powers of withdrawal could be really useful are when an award has shown that the Government was seriously misled by an underestimate of the value of the land. Reference was also made to the observations made by the Collector of Madras, who in consultation with the Chairman, State Housing Board, has stated that the hut-dwellers have requested the exclusion of the land from acquisition and that the Chairman has recommended that the land may be excluded from acquisition. It is this which promted the Government to make the impugned order. The argument, however, is that the Chairman, State Housing Board, did not make any such recommendation on his own, but he was prompted to do so because M(I) and M(H), after inspection, have decided to leave out the area comprised of N. S. K. Nagar

from acquisition. It was brought out in the course of arguments that M(I) refers to Minister of Industries and M(H) refers to Minister for Housing.

5. In the counter-affidavit filed by the State the facts stated are clearly admitted. It is said that the Government decided to withdraw these lands from acquisition even in 1967 and that they had the right to issue the impugned order, though in 1969. The factual allegation that possession of the property has been taken in some shape or other is denied. It is said that no prejudice has been caused to the petitioner and the allegation that the withdrawal is motivated and for the purpose of helping the occupants in N.S.K. Nagar is denied. If the hut-dwellers occupied these lands in the course of the land acquisition process, the petitioner is to be blamed for it. As the Government had an absolute power under section 48 to withdraw the lands from acquisition, before possession is taken they did so.

6. The 2nd respondent, namely, the Corporation of Madras, admits that the Kalai Valluva Mandram which posed itself to be a Welfare Association in N. S. K. Nagar, approached the Corporation for locating an elementary school and for improving the locality and that the Corporation agreed to do so at the instance of the Councillor of the division and that no plan has been sanctioned by the Corporation for any construction over these lands. It is conceded that the beneficiary of the acquisition process was the Chairman, State Housing Board and it was at his instance the impugned notification was made. For all the above reasons it is said that the writ petition is devoid of merit.

7. In the course of arguments learned counsel for the petitioner mostly relied upon the facts and circumstances of this case and urged that by the time the notification was issued by the State, there was an exhaustion of power since it should reasonably be presumed in the instant case that the Government should be deemed to have taken possession of the lands in question. Once this position is reached, the impugned notification fails for want of jurisdiction. The theory of promissory estoppel is also pressed into service. In answer to the allegation that the petitioner is not prejudiced, it is said that the property is a total loss to him and as he could not interfere with the land in any manner after a notification under section 4 (1) is made and after the lands are included in a scheme sanctioned by the State Housing Board under the State Housing Board Act it is idle to say that the petitioner is to be blamed for his inaction in having allowed the trespassers to get into the land and foist themselves in it. On the other hand, the learned Advocate General would say that as possession, in fact, has not been taken by the Government and as there is no evidence to that effect, the impugned notification does not suffer from any error of jurisdiction or want of jurisdiction or excessive exercise of jurisdiction. The State Housing Board merely appeared by counsel and would not urge any serious contention for the consideration of this Court.

8. Having regard to the long drawn process in which the suit land was involved in an acquisition process and as such an event by itself is a strange one which is not normal, this Court felt that it was necessary to get sufficient facts from the records which the parties are obliged to produce in a proceeding under Article 226, and for that purpose appointed a Commissioner to go into the question and find out the nature and purport of the events that transpired with reference to the correspondence and the public records which give a colour to the land acquisition proceedings which are to be scrutinised by me.

9. We have already seen that the notification under section 4 (1) of the Land Acquisition Act was made by the Government at the instance of the beneficiary namely, the State Housing Board, it is common ground that the State Housing Board was of the view that for purposes of development of the areas in the neighbourhood of the Madras City and the development schemes of the Government of India, the lands in question were needed for purposes of such development. In the said notification no reference is made to any person in occu-

pation of the premises. But soon thereafter representations were received from persons who are admittedly trespassers into the land stating that they have occupied it under a mistaken impression that it was Government land and that they were prepared to purchase the land with the help of the Government and they requested the Government to modify the scheme so as to suit their own purposes. From the records of the Land Acquisition Officer it is seen that the persons in occupation were keen on securing parcels of the acquired lands at cheap prices and that they had no objection to the acquisition and that they may be allowed to continue in the present lands till alternate sites are provided. The trespassers began to slowly develop their case from time to time and there were many other emigrants into the land later. When such representations were made, a conference was held as between the Joint Director of Town Planning, Engineer, Corporation of Madras, in the presence of the Land Acquisition Officer. In November, 1960, the Government issued a Memo. dated 21st November, 1960, but this document has not been produced. A reference to it, however, is made in the letter from the Special Deputy Collector to the Director of Town Planning (M5 28741/60 dated 5th January, 1961). The following is the relevant portion of the letter:

"This land is within the scheme area shown in the composite blue print plan for West Madras Neighbourhood prepared by the Joint Director of Town Planning. The Joint Director of Town Planning and the Madras Corporation Engineer expressed the view at a conference held after a joint inspection that no land in the scheme area could be exempted from acquisition and all the lands and the structures within the scheme area are to be acquired."

Even the Board of Revenue, as early as January, 1961, in their Ref. No. 14. 18526/60-1 dated 28th January, 1961, asked the Collector to ascertain and report as to how the Corporation of Madras has proposed to rehabilitate the families affected by the acquisition in the case. When the Commissioner was asked about it, he replied in March, 1961 as follows:

"With reference to your letter cited I have to state that the building applications submitted by the occupants in S. No. 1/1-A of Arumbakkam have been refused by this office for the reasons that the layout for this area has not been got sanctioned and that this site is notified for acquisition under section 4(1) of the Land Acquisition Act. The appeal of these residents against the refusal of their building applications is now pending consideration of the Standing Committee (Town Planning and Improvements).

Since this field is included in the West Madras Township Scheme the question of re-habilitation of the families affected by the proposed acquisition should form part of the Township Schemes and is a matter pertaining to the State Housing Board which will be executing the Scheme."

The Joint Director of Town Planning expressed the view, in his letter Rc. No. 3237.61 dated 29th March, 1961, that it would not be possible to recommend the exclusion of the land from the acquisition and that the question of rehabilitating the families now resident in the area would be a question for the State Housing Board who are acquiring the land and will not be the responsibility of the Corporation of Madras. It was in those circumstances that the Board strongly recommended that the declaration under section 6 may be proceeded with and the families affected by the acquisition may be sympathetically considered by the State Housing Board who shall take steps to rehabilitate them. The Government, Industries, Labour and Co-operation Department, in their Memorandum No. 158236 S.I/60-11 dated 13th February, 1962 have stated as follows:

"While submitting the Draft Declaration under section 6 of the Land Acquisition Act, in respect of certain lands required for Neighbourhood Projects, the Collector of Madras has brought to the notice of Government the

requests of the families affected by acquisition, for alternative accommodation. The Board of Revenue has suggested that the State Housing Board may be requested to rehabilitate the affected families. The matter was referred to the State Housing Board, which considered the question in all aspects and has resolved as follows:

" (*a*) The owners may be given preference in allotment of building sites on hire purchase subject to eligibility and other rules, at the price fixed by the Board for the public, such sites being, as far as possible, near their original places of occupation;

(*b*) The authorised tenants may be given plots on sale basis at prices fixed for the public, or in the alternative small plots may be leased out to such of those who are unable to buy, on economic lease rents prescribed by the Board;

(*c*) The case of squatters may be left to Government to decide on merits.'

2. The Government have considered the recommendation of the State Housing Board and passed the following orders:—

Item (*a*) The Government accept the recommendation. Item (*b*) The Government accept the recommendation. The State Housing Board is however, requested to see that the authorised tenants, are allowed to continue to dwell in the present dwellings (on terms fixed by the Board) till alternative sites are provided to them.

Item (*c*) Generally the squatters should be evicted. In deserving cases, the State Housing Board will be instructed by Government to frame a suitable project under the Slum Clearance Scheme for their rehabilitation".

It is therefore very clear that in February, 1962 the Government had in view the case of the squatters and they were of the opinion that the squatters should be evicted and that in deserving cases the State Housing Board will be instructed by the Government to frame a suitable project under the Slum Clearance Scheme for their rehabilitation.

10. Even then the squatters went on submitting memorandum after memorandum to the Government. The Collector of Madras in D. Dis. 1802/61 dated 27th June, 1964 stated that the objections of the squatters may be overruled, that their objections are of a common nature and that they will be given alternative accommodation by the State Housing Board when they are actually evicted. It may be of interest to point out that at every stage the squatters were admitting the title of the petitioner to the property; but their ultimate request was to pass orders to acquire the area and thereafter permit them to occupy those plots which they have clandestinely occupied, but after accepting a reasonable cost from them. After all this, the Collector of Madras wrote to the Government in J6.D.Dis. 26389/64 dated 1st October, 1965 stating that the objections of the squatters were without substance and that they may be overruled and he sought for orders for the publication of the declaration under section 6. Pursuant to that, declaration under section 6 was made and an award enquiry was held in which the occupants of the so called N.S.K. Nagar appeared before the Land Acquisition Officer. He also expressed the view that as the award enquiry is over whether he may proceed to pass the award. It was at this stage a hint was given in the letter of the Land Acquisition Officer, dated 17th May, 1966, that the Secretary of the Kudivazvor Sangam of N.S.K. Nagar met the Chairman, State Housing Board and that he was informed that the land acquisition proposal has been dropped. The files do not disclose as to how and in what circumstances the Chairman, State Housing Board, who was very eager to acquire the lands, recommended that it could be dropped. When the Chairman was confronted with his inconsistent attitude the Chairman wrote to the Government as follows:

"I state that the land bearing S. No. 1/1-A of Arumbakkam which comprises of N.S.K. Nagar for which the Draft Declaration has been approved by the Government in the G.O. cited is full of huts numbering about 350. The hut-dwellers have requested the exclusion of the land from acquisition,

> After careful examination it is considered that the land may be excluded from acquisition. I therefore request early orders of Government excluding the land from acquisition."

In this letter it is clear that the only consideration for dropping the acquisition after the infiltration of the trespassers into the land, which was practically encouraged by both the Corporation authorities and the Governmental agencies, was that the hut-dwellers have requested the exclusion of the land from acquisition and therefore the lands may be excluded from acquisition. When he was further confronted by the Secretary to Government, Industries, Labour and Housing, with the following letter,

> "I am to invite attention to the letter cited and to state that the land in S.No 1/I-A full of huts numbering about 350 has already been brought to the notice at the time of 5-A enquiry and the objection to acquire this land was overruled on the recommendation of the Collector of Madras and the Chairman, State Housing Board. But it is not known why the Chairman, State Housing Board, has now taken a different view and recommended the withdrawal from acquisition. I am to request the Chairman to clarify the position at a very early date".

the Chairman wrote back :

> "With reference to your letter cited, I am to state that M(I) and M(H) after personal inspection of the area have decided to leave out the area comprised of N.S.K. Nagar from acquisition. *In pursuance of the above decision only*, I have recommended the exclusion of the land from acquisition."

Thereafter the Government proceeded on the basis that it was the Chairman, State Housing Board, who was not for acquisition and that he recommended that the lands may be excluded from acquisition. It was made out in G.O. Ms. No. 925 (Housing), Department of Industries, Labour and Housing, dated 13th March, 1967, that it was on the recommendation of the Chairman that the Government decided to exclude the lands from acquisition. Two years later and after all that has happened, the impugned notification has come.

11. It is thus seen that the Chairman, State Housing Board, by himself did not recommend exclusion of the land from acquisition. As a matter of fact, he was opposing the hut-dwellers and was keen upon acquiring the land. It is common ground that the statutory Board functioning under the Madras State Housing Board, did not pass any resolution cancelling the scheme or avoiding the scheme in a manner known to law. The narrative of facts above discloses that it was purely on humanitarian considerations, but by totally ignoring the rights of the petitioner, that the Government made an on the spot decision through the executive to drop the acquisition. The Chairman, State Housing Board, had to confess that it was because of the decision of the executive in the above manner that he recommended the withdrawal. Nothing has been brought to my notice to show that the entire circumstances were reviewed by the Chairman, State Housing Board or by the executive at any time to come to a reasonable decision on a fact which has become almost a *fait accompli*. Government knew that the trespassers have occupied the land. The Corporation of Madras encouraged them by spending public money and putting up streets and lighting therein and by opening schools. Mr. Thillai Villalan sought to argue that the Corporation was in the dark about the affairs. I do not agree. The Corporation was represented by its Engineer in conferences, which were held from time to time and the Corporation knew that the hut dwellers therein had no right to occupy the private land, but yet public money was spent to put up roads in it and even lighting thereon. This was duly budgeted for. That a large sum of money has been so spent from and out of the Corporation funds is not in dispute in this case. But what is stated by Mr. Thillai Villalan is that such expenditure was incurred at the instance of the Municipal Councillor and that it was not a regular expenditure. He would, however, admit that the expenditure was budgeted and that the said budget was forwarded to the Government which ultimately approved

of the same. The State Housing Board represented by counsel was not in a position to take a definite stand and no further arguments were addressed before me. It is in these circumstances the subject comes up before me for the issue of a writ of *certiorari*.

12. The notification under section 48 (1) of the Land Acquisition Act, for withdrawal of the land acquisition process refers to the letters of the Chairman, State Housing Board. The decision taken by the Government in G.O.Ms. No. 925-(Housing), Department of Industries, Labour and Housing, dated 13th March, 1967 is also one of the captioned references. In the above Government Order it is said that the Chairman, State Housing Board, has recommended that this land may be excluded from acquisition and it was consequent upon this the Government decided to exclude the land from acquisition. Factually this has no legs to stand. When the Chairman, State Housing Board, was confronted with such a situation, he categorically said in Exhibit P-41, one of the exhibits marked by the Commissioner, that it was the State executive represented by Ministers who decided to leave out the area and it is only pursuant to the above decision he recommended the exclusion of the land from acquisition. I have also referred to the fact that the executive took an on-the-spot decision when they inspected the land. Every other limb of the State Government, such as the State Housing Board, the Director of Town Planning, and the statutory authorities, like the Corporation of Madras and even the executive, namely, the State Government at one time and prior to the declaration made under section 6 of the Land Acquisition Act in Exhibit P-26, were irrefragably of the view that the squatters in occupation of a portion of the land to be acquired may be given plots after the scheme is developed by the State Housing Board on prices to be fixed by the Board and the unauthorised occupants be dealt with by the Government on merits. In fact, the Government, while accepting the recommendations made by the Collector of Madras, Board of Revenue and the Chairman, State Housing Board, said in Exhibit P-26 that the authorised tenants be allowed to continue to dwell in the present dwellings till alternative sites are provided to them. On the question whether the squatters should be evicted, the Government agreed that they should be so evicted, but in deserving cases the State Housing Board be instructed to frame a suitable project under the Slum Clearance Scheme for their rehabilitation. After all this, there is nothing on record to show as to why the executive through its Ministers made a decision without reference to merits to exclude the land occupied by the occupants from acquisition and ultimately decided to drop out the entire land from acquisition. On the merits it is clear that the executive after inspection decided only to leave out the area comprised of N.S.K. Nagar from acquisition. It did not decide at any time until it passed the impugned order to exclude from acquisition the entire property belonging to the petitioner for purposes of the West Madras Neighbourhood Project. Here also there is a lacuna. I am, therefore, satisfied that there is an error apparent in the order as both G.O.Ms. No. 925 dated 13th March, 1967 (Exhibit P-42) and also Exhibit P-43, which is the challenged notification, do contain information which is obviously an apparent error. The Chairman, State Housing Board, did not recommend that the land may be excluded from acquisition. On the other hand, he made it clear that in pursuance of the decision of the executive to leave out the area comprising of N.S.K. Nagar from acquisition, he says that he recommended the exclusion of the said land from acquisition. Even then, it is only that portion of the land which comprises of the so called N.S.K. Nagar which ought to have been excluded. But in the challenged notification the entire land has been withdrawn. This apparent error, therefore, necessarily justifies judicial interference under Article 226 of the Constitution.

13. The next question is whether section 48 (1) of the Land Acquisition Act should be literally interpreted and understood. No doubt, the contention of the learned Advocate General that as physical possession has not been taken

by the State, the jurisdiction of the State to withdraw the subject-matter of acquisition from acquisition is always available, is a proposition which *prima facie* has to be accepted. But in the peculiar case with which I am confronted, it is necessary to see whether the owner has been deprived of possession of the land, the term possession being understood in a legalistic and juristic way. No doubt, the force of statute law is strong and imperative. But it should not be forgotten that the law draws its waters from the natural springs of society itself, not from the artificial reservoir of Parliament. As pointed out by a witty writer Judge E. A. Parry in The Drama of the Law, "statutes" are only quoted. Their disastrous effect on human happiness has made them rightly repellant to men of generous minds. Even Judges can scarcely hide their contempt for statutes that enact the opposite of what their author intended and only serve to entangle the simple and innocent in a net of ruin." Before this aspect is furthered, it is better to recapitulate once again the necessary facts.

14. Notification under section 4 (1) was made in August, 1960. At that time there was no indication that there were any squatters in the land. The Collector of Madras recommended the acquisition in December, 1960. The Joint Director of Town Planning was emphatic that the property should not be left out of acquisition because the vast developing Poonamallee High Road would call for widening and introduction of service roads and the major design of the neighbourhood will require the land to be used for purposes of other than what it is now being used for. This observation was made by the Director of Town Planning in March, 1961. The Board of Revenue, in April, 1961, after considering the question of squatters who by then got into the field, recommended a declaration to be made under section 6. The Government, in December, 1961 made the first declaration under section 6, if such an expression could be used. This was obviously made after the Government was satisfied that the presence of squatters cannot be a hindrance for acquisition. In February, 1962, the Government made it clear in Exhibit P-24 that it had accepted the resolutions of the Board and the squatters be evicted but in deserving cases they may be rehabilitated. Then followed a lull, because between 1962 and 1964 third parties interfered and questioned the very scheme of the State Housing Board and consequentially the acquisition of lands for purposes of the neighbourhood scheme. Once again in 1974 the matter was taken up after the judgment went against the owners in which the petitioner did not participate. In June, 1964, the Collector once again after making a specific reference to the request of the squatters, recommended that the land in question may be acquired. Again an enquiry under section 5-A was made. In October, 1965 the Collector sent again a draft declaration recommending acquisition and observing that the squatters could be sympathetically dealt with by the State Housing Board. In April, 1966 the Government accepted the same and was satisfied that the land is required for a public purpose. During this period of six years the petitioner could not have dealt with the land in any manner as by then he was lulled into a security by the promises held out by the Government Officials including the Collector of Madras, the Board of Revenue, the Land Acquisition Officer and the Director of Town Planning that in spite of the infiltration by trespassers his property could be acquired. The sanctioned scheme has not been amended to avoid the acquisition. The petitioner therefore, could not have taken any steps in any direction to assert his right on the land within the scheme area when the Government was looking after his interests. It is only thereafter that a sudden turn was made in 1966 when the State executive through its Ministers after personal inspection of the area decided to leave the area comprised of N.S.K. Nagar from acquisition. No file has been shown to me as to whether while expressing that view or deciding in that way the State Government exercised its mind and considered the relevant material. It seems to me that the decision was arrived at only on humanitarian consideration, but while contemporaneously ignoring private rights.

15. In such circumstances when the Government decides nearly after nine years to withdraw from acquisition a particular land for reasons which are not relevant, but purely on extraneous considerations, it is necessary to see and adjudge whether such a decision is made by a quasi-judicial tribunal or not and whether it is sustainable in law.

16. Apart from the apparent error in the impugned order which by itself is a ground for interference under Article 226 of the Constitution for the issue of a writ of *certiorari* to remove such an erroneous order, other features in this case broadly referred to above would enable the petitioner to succeed.

17. The law of Eminent Domain enables the State to compulsorily acquire private land. By such a statutory process the owner is deprived of his rights to own property. This he has to suffer in public interest. But what is relevant for our purpose is that the land acquisition process which contemplates the ultimate taking of possession, necessarily involves a substantial abridgment of the rights of ownership as would amount to deprivation of the owner of his property and consequential damage, as is referred to in section 23 of the Land Acquisition Act. The word 'possession' in section 48 of the Act has to be interpreted liberally and in the above light. No irrefragable test can be laid down as to whether on a furnished hypothesis, the owner is deprived of his property by the land acquisition process beginning from the notification under section 4 (1) and ending with the award enquiry under sections 9 and 10 of the Act. The words 'possession' and 'deprivation' have been considered by the Supreme Court while interpreting Article 31 of the Constitution of India. In my view, the meaning of those terms in the decided cases, though arising under Article 31 of the Constitution, provide a safe guide for interpreting the word 'possession' in section 48 (1) of the Land Acquisition Act, which term engulfs within it the expression "substantial deprivation of rights of ownership'. In *Subodh Gopal Bose's case*[1], it is said:

> "Broadly speaking, it may be said that an abridgement would be so substantial as to amount to deprivation ......if in effect it withheld the property from the possession and enjoyment of the owner or seriously impaired its use and enjoyment by him or materially reduced its value".

To a similar effect are the observations of the Supreme Court in the *Second Sholapur Mills Case*[1]:

> "By substantial deprivation I mean the sort of deprivation that substantially robs a man of those attributes of enjoyment which normally accompany rights to or interest in property. The form is unessential. It is the substance that we must seek".

18. It is, therefore, fairly clear that acquisition of property is equivalent to substantial deprivation of property rights. An extinguishment of private right in property is possible by objective acts such as physical taking over as well as by acts of omissions and commissions leading to the same effect and resulting in robbing of the owner of the attributes of enjoyment which are annexed to ownership. As an eminent author has said:

> "Just as the power of eminent domain is an incident of sovereignty and does not require express constitutional provision, so also is the liability to compensation by the State to the deprived owner an inseparable incident or concomitant of the exercise of the power of eminent domain".

19. In the instant case for nine years, the owner was lulled into security that his property was eminently suited for a public purpose, to wit the formation of the West Madras Neighbourhood Scheme when it has not been amended or revoked. As already stated, all the wings of the Governmental machinery agreed that the land had to be acquired. In fact, they were not prepared to accede to the requests of the trespassers and occupants in the land for exclusion of the same from public acquisition. Public records of 1960 disclose that there were no occu-

1. 1954 S.C.R. 587 : 1954 S.C.J. 127 : 67 L.W. 206 : A.I.R. 1954 S.C. 92.

1. 1954 S.C.R. 674 : 1954 S.C.J. 175 : (1954) 1 M.L.J. 355 : A.I.R. 1954 S.C. 119.

pants in the land when the notification under section 4 (1) was made. The squatters encouraged by the sympathy expressed by the Government and other statutory bodies from time to time, changed their case as to the period of occupation; but this is irrelevant. Courts are guided by records and in the instant case we have the definite data in the notification under section 4 (1) to the effect that no one was occupying the land on the date when the acquisition was proposed. Latterly the squatters began to occupy the land, no doubt without authority. But yet the Government was stubborn in that they expressed in Exhibit P-26 dated 13th February, 1962 addressed to the Chairman, State Housing Board, that the squatters should be evicted and the acquisition proceeded with. They, however, expressed sympathy in favour of unauthorised occupants and recommended to the State Housing Board to rehabilitate them. The State Housing Board, which is the architect of the scheme which is still in force and which always recommended acquisition of the land in question, was directed to take steps towards such rehabilitation. Thus the petitioner as the owner was from time to time assured of the acquisition. Three Writ Petitions were filed and the action pursued by the Government authorities do all support the view that the acquisition was never intended to be given up. As already found, the Chairman, State Housing Board, did not say that the land may be withdrawn from acquisition. On what data and premises the Government acted is not known. On the merits, facts and circumstances, the reasonable inference appears to be that such an on the spot decision was taken purely on humanitarian and sympathetic grounds towards squatters and not on any relevant ground traceable to the object of the main enactment or in relation to acquisition of private property or withdrawal of such property from acquisition after nine long years. It is also pertinent to observe that such a biased decision was taken after the High Court issued a writ of *mandamus* and expected that the award would be passed as other formalities were by then over. The impugned order does not serve any of the objects of the Act and such exercise of power is arbitrary and capricious as it is based on irrelevant material. As pointed out by the Supreme Court in *S. Pratap Singh* v. *The State of Punjab*[1]:

> "Where an authority exercising a power has taken into account as a relevant factor something which it could not properly take into account, the exercise of the power would be bad. Where the purposes sought to be achieved are mixed, some relevant and some alien to the purpose, the difficulty is resolved by finding the dominant purpose which impelled the action, and where the power itself is conditioned by a purpose, the Courts would invalidate the exercise of the power when an irrelevant purpose is proved to have entered the mind of the authority ....The only question which could be considered by the Court is whether the authority vested with the power has paid attention to or taken into account circumstances, events or matters wholly extraneous to the purpose for which the power was vested, or whether the proceedings have been initiated *mala fide* ....If the act is in excess of the power granted or is an abuse or misuse of power, the matter is capable of interference and rectification by the Court.
>
> (*iii*) It is not correct to say that *mala fides* in the sense of improper motive could be established only by direct evidence, that is, that it must be discernible from the other impugned or must be shown from the noting in the file which preceded that order. If bad faith would vitiate the order, the same can be deduced as a reasonable and inescapable inference from proved facts."

On a fair understanding of the facts and appreciation of the matter which preceded the impugned order, the inference is inescapable that the order challenged has been passed on grounds which are totally irrelevant. Further, in the above conspectus, one is bound to infer that there has been a total and complete destruction of private rights by reason of the

1. (1964) 4 S.C.R. 733 : A.I.R. 1964 S.C. 72.

acquisition process. The bundle of rights which can support the primary right of ownership have been slowly taken away. The Government machinery has acted to the prejudice of petitioner. The State Housing Board which had the main say in the matter, refrained from exercising its mind, but was satisfied to pithily follow the directions of the State, though the circumstances did not warrant such a course. The Corporation of Madras assisted the Government by spending public money over this land by improving the same, by providing roads and lighting and providing public schools therein. I am, therefore, of the view that by such acts of omissions and commissions on the part of the State, the State machinery and the statutory bodies which are controlled by it, the property sought to be acquired was withheld from the possession and enjoyment of the owner resulting in the total annihilation of the attributes of enjoyment which are annexed to ownership. If effectively the owner's right to enjoy the property has thus been prevented for nine years and when by such long delay and by such encouragement given to the trespassers there has been a serious impairment of the value of the property and the petitioner's right to enjoy it, then it is said that the State is estopped from exercising their statutory powers under section 48 (1) of the Act, on the principle of promissory estoppel. This principle is well stated by George Spencer Bower and Turner in their treatise on Estoppel by Representation, Second Edition, in para. 111 at page 101:

> "It is further to be noted that a representee is deemed to have altered his position for the worse, not only when he has adopted a positive course of action which he would not have adopted but for his belief in the truth of the representation, but also when he has abstained from taking measures for his protection, security or advantage which he had in contemplation, and which, but for the representation, he would have taken; or when he has persisted in a line of conduct which otherwise he would have abandoned, or was on the point of abandoning. This kind of change, indeed, may even in a strictly literal sense be fairly described as an alteration of position, if the term 'position' be understood as comprising a man's plans, schemes and projects, as well as his possessions—his attitude towards the future as well as the state of his affairs at the moment. But, be this as it may, there is no doubt that, in contemplation of law, 'laying to rest' or 'quieting', to use the expressions most frequently applied to this class of cases in the authorities, is one of the recognised modes of altering a man's position."

In the following illustration cited by the author, the principle is again well brought out:

> "........a representee has been held to have altered his position (in the above sense) to his prejudice where he has, on the faith of the representation, omitted to protect himself from the consequences of a void or frustrated transaction by effecting the object of that transaction elsewhere, or by other means, as he would have done but for his belief in its validity and efficacy".

The Supreme Court in *Union of India* v. *Anglo-Afghan Agencies*[1], observed thus:

> "Even though the case does not fall within the terms of section 115 of the Evidence Act, it is still open to a party who has acted on a representation made by the Government to claim that the Government shall be bound to carry out the promise made by it, even though the promise is not recorded in the form of a formal contract as required by the Constitution.
>
> Under our jurisprudence the Government is not exempt from liability to carry out the representation made by it as to its future conduct and it cannot on some undefined and undisclosed ground of necessity or expediency fail to carry out the promise solemnly made by it, nor claim to be the judge of its own obligation to the citizen on an *ex parte* appraisement of the

1. (1968) 2 S.C.R. 366 : (1968) 2 S.C.J. 889 : A.I.R. 1968 S.C. 718.

circumstances in which the obligation has arisen."

Again in *Seth Sat Narain* v *Union of India*[1], the Supreme Court considered the principle of promissory estoppel and said that the principle will apply only if there is either a promise or an assurance intended to be acted upon and only when the same is in fact acted upon.

20. In the instant case an assurance was undoubtedly given by the state as early as 1960 to the effect that the petitioner's property would be acquired. Quite parallel to this assurance, the Government and its machinery including other statutory bodies under its control, were so acting so as to totally reduce the possessory rights of the petitioner as owner of the property to nil and completely render nugatory the property as private property. In those circumstances the assurance should be said to have been acted upon and in fact acted upon. Then on grounds of expediency and on some unknown and undisclosed ground of necessity if the State, on its own volition, decided to act against the assurance they are estopped rom doi ng so on the principle of promissory estoppel. It is too late in the day for the State to say that they are not bound to continue the acquisition proceedings and that they have the residuary power to withdraw it from acquisition. In this context it is apposite to adopt the ratio of the Supreme Court in *Vijay Cotton and Oil Mills Limited* v. *The State of Gujarat*[2]. In the peculiar circumstances of that case the Government was prevented to resile from the election which it deliberately made. Following this principles, the principle of election is equally applicable here in that the Governmental machinery at no time held that the acquisition was not for public purpose. As a matter of fact, the records disclose their incessant desire to acquire the land. The scheme is still in force. They have therefore elected to act in one way. But to resile from it on no foreseeable ground of acceptable material is not possible for the State in the purported exercise of power under section 48 (1) of the Act.

21. The next pertinent question is whether the Government should be deemed to have acted as a quasi-judicial tribunal when it passed the challenged order. Ordinarily the power of the Government to cancel a notification under section 4 (1) of the Act as also to withdraw lands of which possession was taken for purposes of acquisition has to be conceded both under the General Clauses Act as well as under the express provisions in the Land Acquisition Act. But when the facts in a given case are peculiar and when the principle of promissory estoppel or election is invocable because of such facts and circumstances, a further probe is necessary to find as to in what capacity the State acted when it issued the challenged notification under section 48 (1) of the Land Acquisition Act.

The following rules are very well settled :

(1) The duty to act judicially may be inferred from provisions of a particular statute which would provide for the nature of the proceedings, the opportunities of hearing the party adversely affected and the nature of consequences flowing from the order of the concerned authority.

(2) The High Court will not substitute its own view on the merits in the place of an administrative or executive finding on facts. It will only see if the administrative authority or tribunal was really acting in exercise of the powers it has under the law or rule and in good faith and in accordance with accepted notions of fair play and natural justice.

(3) The statute is not likely to provide in so many words that the authority to act is required to act judicially ; that can only be inferred from the express provisions of the statute read along with the nature of the rights affected. A duty to act judicially may arise in widely different circumstances.

(4) Where, however, the statute is silent, the duty to act judicially may be inferred from the provisions of the statute or may be gathered from the cumulative effect of the nature of the rights affected, the manner of disposal

1. C.A. No. 646 of 1964.
2. (1969) 2 S.C.R. 60.

provided, the objective criterion to be adopted, the phraseology used and other indicia afforded by the statute.

(5) That if a statutory authority has power to do any act which will prejudicially affect the subject, then although there are not two parties apart from the authority and the contest is between the authority proposing to do the act and the subject opposing it, the final determination of the authority will yet be a quasi-judicial act provided the authority is required by the statute to act judicially.

(6) In quasi-judicial proceedings, the bed-rock of fair play and justice rest in the observance of the rules of natural justice.

(7) When the right to be affected is a natural or common law right of a person there is a presumption that the authority vested with the power to affect such right must act quasi-judicially.

(8) The question whether or not there is a duty to act judicially must be decided in each case in the light of the circumstances of the particular case and the construction of the particular statute with the assistance of the general principles laid down in the judicial decisions. The principles deducible from the various judicial decisions are:

(*a*) that an authority not being a Court in the ordinary sense, empowered by a statute to decide disputes between parties, there being nothing in the statute to the contrary, is under a duty to act judicially and the decision of the authority is a quasi-judicial act, and

(*b*) final determination by a statutory authority empowered to do any act which will prejudicially affect the subject will be a quasi-judicial act though there are no two parties and the contest is between the authority and the subject, provided the statute requires the authority to act judicially.

22. In this case, having regard to the circumstances which happened, the manner in which the decision to withdraw was taken was peculiar. If after a lapse of nine years an acquisition process is going to be withdrawn, there should be a definite reason for it. In fact, the Land Acquisition Manual refers to normal cases wherein withdrawal is usually ordered. They are:

"In the following cases withdrawal is usually ordered :

(1) If the amount of compensation to be paid prove to be much larger than that anticipated. This cannot be determined until the award has been fully framed and considered.

(2) If the owner insists under section 49 (1) that the whole of his house or building or that the lands which on a reference made to the Court is declared to form part of his house or building which is not required for the purpose of the acquisition should be acquired, and it is decided that the cost involved is too high. If the acquisition is for a local authority or company the Collector should in such a case consult it to enable it to decide whether to exclude the whole of such house or building.

(3) When there are grave defects in the award which cannot be cured, except by withdrawal from the acquisition.

(4) If, on a consideration of the objections raised in the course of the enquiry under section 5-A of the Act and the Collector's report thereon, the Government decide not to proceed with the acquisition.

When the area acquired or required is less than the area notified withdrawal is unnecessary provided the boundaries as notified hold good in respect of the reduced area."

The power to withdraw, therefore, has to be interpreted *ejusdem generis* with the specific cases mentioned above. In the instant case there is absolutely no reason for withdrawing the lands from acquisition as it was unequivocally felt at all times that the lands were required for the public purpose. But when the State wanted to decide as it did, then it was aware that it was interfering with private lands. It, however, ignored such rights and on

its own volition decided to the prejudice of the person owning such bundle of rights. In such circumstances it could reasonably be assumed that the statute required the State to act judicially, but it did not act in accordance with the well-known principles referred to above while exercising its power as a quasi-judicial body though acting under the powers of a statute. They were in seisin of all the facts, but no fact or no relevant material is the foundation for the decision. They were equally aware of the damage to the petitioner's rights of enjoyment over the property having regard to the encouragement given from time to time to the trespassers into this land during the course of the land acquisition process. It is, therefore, clear that while acting judicially the impugned order was passed. The decision being the result of a quasi-judicial act, it has to fall because extraneous and irrelevant material entered into the computation while deciding to withdraw the land from acquisition. The dominant purpose appears to be to help the squatters to the utter prejudice of the petitioner who was not even consulted in the matter. There is a violation of the principles of natural justice as well when the State acted as it did.

23. The last aspect which remains for consideration is whether a writ of *certiorari* in the above circumstances ought to issue and the challenged order removed. I have held that there is an error apparent in the order. I expressed the view that the Government is estopped from resiling from their original assurance held out to the petitioner on which they acted upon that his land would be acquired for the accepted public purpose. The public purpose is still there. There is nothing on record to show that the officers of the Government or those bodies which were under their control were not for acquisition. A capricious exercise of power in section 48 (1) is not contemplated, because it would not be exercise of power, but it would be an abuse of power. The entirety of the facts make out that the State knowing that it would impair private rights, wanted to encourage squatters as they were sympathetic towards them. As the decision, therefore, is based upon material which cannot enter into the discussion, the exercise of power in the manner stated above and in the circumstances cannot be accepted to be a proper exercise of statutory power. When there is such irrational and illegal exercise of statutory power, then the resultant order has to be removed by issuing the rule under Article 226 of the Constitution of India. In the above circumstances the Writ Petition is allowed and there will be no order as to costs.

R.S. — *Writ Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*M. M. Ismail, J.*

Yuvarajan (Minor) and others .. *Appellants**

v.

The Mylapore Hindu Permanent Fund Ltd., at Nos. 30 and 31, South Mada Street, Mylapore, Madras and represented by its Secretary and others .. *Respondents.*

Transfer of Property Act (IV of 1882), section 69—Mortgages by two brothers forming joint family—Sale of property under power of private sale—Sons born subsequent to mortgages and before sale—Position—Scope of section 69—Notice to any one of the mortgagors sufficient—Power of sale properly exercised—Appellants cannot claim redemption.

It is significant that under section 69 of the Transfer of Property Act what is authorised to be sold is the mortgaged property itself and not any smaller or lesser or limited interest carved out of the mortgaged property. When the section itself contemplates giving of notice under sub-section (2) thereof, to any one of the mortgagors, it is too much to contend that simply because pursuant to the said sub-section notice is given only to one of the mortgagors, and a sale is held thereafter it is only that mortgagor's interest that is passed by the sale and not the interest of all the mortgagors in question. The legal position flowing from the language of section 69 is that what is contemplated by

* Appeal No. 849 of 1971.

10*th March*, 1975.

that section is the sale of the mortgaged property itself and not the interest of any one particular mortgagor. [*Para.* 7.]

If the conferment of the power on the mortgagee to sell the property is valid and beyond challenge, and the appellants were not born at the time of the mortgages, it logically follows that the exercise of that power, so long as that power has been properly exercised according to the procedure prescribed by law, cannot be called in question. [*Para.* 9.]

Cases referred to :—

V. Narasimhachariar v. *Egmore Benefit Society 3rd Branch Ltd.*, 67 L.W. 1147 : A.I.R. 1955 Mad. 135 ; *Paramanand Doss Chota Dass and Sons, a firm of Merchants at Madras and others* v *Nannulal Kanji and others*, (1941) 2 M.L.J. 923 : 54 L.W. 656 : I.L.R. (1942) Mad. 287 : A.I.R. 1942 Mad. 232 ; *Bridges* v. *Longmead*, (1857) 53 E.R. 267 ; *Niamal Rai* v. *Din Dayal* (1927) 54 I.A. 211 : 52 M.L.J. 729 : A.I.R. 1927 P.C. 121 ; *Kanhayalal* v. *The National Bank of India Ltd.*, (1923) 50 I.A. 162 : 45 M.L.J. 497 : A.I.R. 1923 P.C. 114 : 75 I.C. 7 ; *K. Narayana Rao* v. *Meenakshi Velu and others*, (1973) 2 M.L.J. 467 : 86 L.W. 736: A.I.R. 1974 Mad. 158.

Appeal against the decree of the IIIrd Assistant Judge, City Civil Court at Madras in Original Suit No. 1114 of 1967.

G. T. Ramanujachari, for Appellant.

R. Swaminathan and *M. Kalyanasundaram*, for Respondent.

The Court delivered the following

JUDGMENT.—The plaintiffs in O.S. No. 1114 of 1967 on the file of the City Civil Court, Madras, are the appellants herein. The suit property is a house in Madras City and it admittedly belonged to defendants 11 and 12, two brothers, in moieties. Defendants 13 to 16 are the sons of the 11th defendant, while plaintiffs 1 to 3 are the sons of the 15th defendant. The fourth plaintiff is the son of the 14th defendant. The sons of the 13th defendant are also shown in the plaint genealogy. Defendants 11, 12, 13, 14 and 15 and the 13th defendant acting on behalf of three minor sons, who are not impleaded as parties to the suit, created two mortgages over the suit property under Exhibits A-1 and A-2, both, dated 9th October, 1954, in favour of the first defendant. The mortgage deeds conferred a power of private sale on the first defendant. In exercise of that power the first defendant brought the property to sale and the second defendant was declared to be successful bidder for Rs. 36,350 and the sale was confirmed in his favour. Defendants 3 to 10 are the legal representatives of the second defendant who died pending suit and of them the 9th defendant also died pending suit and the 3rd defendant died pending appeal. Respondents 15 to 18 have been brought on record as the legal representatives of the third defendant 2nd respondent in this appeal. Admittedly the plaintiffs were not born on the date of Exhibit A-1 and A-2, that is, 9th October, 1954. After the property was sold in favour of the second defendant and sale-deed had been taken in the name of his wife, the purchasers filed a suit, C.S. No. 238 of 1965 on the file of this Court for the purpose of obtaining possession of the property. Under these circumstances, the plaintiffs have filed the present suit praying for a permanent injunction restraining defendants 2 to 10 from executing the decree for possession obtained in C.S. No. 238 of 1965 on the file of this Court and for a declaration that the shares of the plaintiffs in the suit property were not affected by the said decree and also for a decree for redemption of both the mortgages. According to the appellant what was sold was only the interest of the mortgagors, namely, defendants 11 to 15 and the minor sons of the 13th defendant, that the interest of the plaintiffs had not been sold by the mortgagee and that therefore their right to redeem the property continued to remain in force, with the result they have got a right to redeem both the mortgages in question. The suit was resisted by defendants 3 to 10 and the contentions put forward by them are reflected in the following issues framed by the trial Court for trial :—

(1) Whether the plaintiffs are entitled to any share in the suit property ?

(2) Whether the plaintiffs are not affected by the sale in public auction by the 1st defendant ?

(3) Whether the plaintiffs are entitled to the injunction prayed for ?

(4) Whether the plaintiffs are entitled to redeem the mortgages in favour of the 1st defendant ?

(5) Whether the suit is not maintainable and whether the plaintiffs have any subsisting right in the suit property ?

(6) Whether the plaintiffs are entitled to challenge the power of private sale granted by their fathers to the 1st defendant under the mortgages ?

(7) Whether the plaintiffs are not bound by the sale by the 1st defendant under section 69 of the Transfer of Property Act and the decree passed in C.S. No. 233 of 1965 on the file of the High Court, Madras ?

(8) Whether the property was sold for an under-value ?

(9) Whether section 69 of the Transfer of Property Act is a clog on the equity of redemption and does it offend Articles 13 and 14 of the Constitution ?

(10) Whether the plaint claim is barred by *res judicata* by reason of the decision in O.S. No. 3471 of 1962 on the file of the City Civil Court, Madras?

(11) Whether the plaintiffs are entitled to claim any relief without setting aside the sale-deed held in public auction at the instance of the 1st defendant ?

(12) Whether the plaint has been properly valued and correct Court-fee been paid ?

(13) To what reliefs are the plaintiffs entitled ?

2. I have not set out the defence in detail and I do not propose to set out the findings on each one of the issues separately in view of the narrow scope within which the appeal was argued before me. All that is necessary to point out in this context is that the learned IIIrd Assistant Judge, City Civil Court, Madras, by his judgment and decree, dated 10th February, 1971, has held that section 69 of the Transfer of Property Act is constitutional, that the power of sale conferred on the first defendant-mortgagee by the mortgage deeds was a valid power, that it has been validly exercised and that consequently the appellants are not entitled to the reliefs they have prayed for, with the result the suit instituted by the appellants was dismissed with costs. It is against this dismissal that the present appeal has been filed.

3. Mr. G. T. Ramanujachari, learned counsel for the appellants, apart from the contention that section 69 of the Transfer of Property Act is unconstitutional, put forward only one argument on merits in support of this appeal.

4. As far as the constitutional validity of section 69 of the Transfer of Property Act is concerned, it is conceded that its validity has been upheld by a judgment of this Court in *V. Narasimhachariar* v. *Egmore Benefit Society, 3rd Branch Ltd.*[1]. This judgment is binding on me and in view of this, no further consideration is called for with regard to this question.

5. As far as the other question on merits is concerned, admittedly the plaintiffs herein were not born on the date of Exhibits A-1 and A-2 mortgages and they were born only subsequent to the mortgages and before the actual sale of the mortgaged property by the first defendant. The mortgaged property was sought to be sold pursuant to a notice, a printed copy of which has been marked as Exhibit A-3. This notice contemplates an auction being held on 11th November, 1962 at 4-00 P.M.

This notice states :

"Under instructions from

The Mylapore Hindu Permanent Fund Limited.,

At the risk and responsibility of

1. T. Sambanda Mudaliar
2. T. Sundaravadivelu Mudaliar.
3. T. S. Rajarathnam.
4. S. Thangavelu.

1. 67 L.W. 1147 : A.I.R. 1955 Mad. 135.

5. S. Subramaniam.

6.	Bhaskaran.	6 to 8 are minors represented by their father and natural guardian T. S. Rajarathnam.
7.	Jayavelu.	
8.	Duraikannu	

6. M/s. Galley & Co., Government Auctioneers, Madras-1 will sell by public auction at the premises on Sunday the 11th November, 1962 at 4-00 P.M.

" *Schedule of the Property*

House and Ground No. 133, Veeraraghava Mudaly Street, Triplicane, Madras, bearing O.S. No. 1313, R.S. No. 2737, C.C. No. 6508, Patta No. C.A. 724 of 1954 measuring about 2 grounds and 671 sq. ft. bounded on the south by S. No. 2736, on the North by S. No. 2738 on the West by S. No. 2725/5 and 2725/7 on the East by S. No. 2714 situate in the Sub-Registration District of Triplicane and in the Registration District of Madras — Chingleput."

7. Mr. Ramanujachari, concedes that because the plaintiffs—appellants were, not born on the date of the mortgages Exhibits A-1 and A-2, they cannot challenge the validity of the mortgages and they are bound by the mortgages. But what he contends is that subsequent to the mortgages the plaintiffs were born as members of the joint family, that consequently they acquired an interest in the equity of redemption in the suit property, and that the said equity to redeem had not been sold pursuant to Exhibit A-3. This contention is sought to be rested on the terms of Exhibit A-3 itself which I have already extracted in full, according to which the property was sold "at the risk and responsibility of" the persons mentioned therein. It may be noticed that the persons mentioned therein are no other than the mortgagors themselves. Mr. Ramanujachari contends that the private sale pursuant to the power conferred on the mortgagee in terms of section 69 of the Transfer of Property Act is a sale which is brought about by offer and acceptance between the mortgagee and the purchaser, that in this case the mortgagee offered to sell only the interest of the mortgagors and not the interest of the appellants who were in existence by that time and that therefore the second defendant did not acquire the interests of the appellants and that he acquired only the interest of the mortgagors. I am unable to accept this argument. In the first place, section 69 of the Transfer of Property Act does not contemplate any such distinction. All that section 69 (1) says is that a mortgagee or any person acting on his behalf, shall, subject to the provisions of this section, have power to sell or concur in selling the mortgaged property, or any part thereof, in default of the payment of the mortgage money, without the intervention of the Court and it specifies the cases where that power can be exercised. Sub-section (2) of section 69 states that no such power shall be exercised unless and until, among others, notice in writing requiring payment of the principal money has been served on the mortgagor, or on one of several mortgagors, and default has been made in payment of the principal money or part thereof, for three months after such service. The significant thing to be noticed in this section is, what is authorised to be sold pursuant to this provision is the mortgaged property itself and not any smaller or lesser or limited interest carved out of the mortgaged property. Another significant thing to be noticed is that under sub-section (2), notice must be given to the mortgagor or one of several mortgagors, if the mortgage has been created by more than one person, and the law does not require that notice must be given to all the mortgagors and it provides that it is enough if notice is given to one of the mortgagors, since that mortgagor will constitute an agent for the other mortgagors also, in the absence of any fraud in that behalf. When the section itself contemplates giving of notice under sub-section (2) thereof, to any one of the mortgagors, it is too much to contend that simply because pursuant to the said sub-section notice is given only to one of the mortgagors, and a sale is held thereafter it is only that mortgagor's interest that is passed by the sale and not the interest of all the mortgagors in question. I have already referred to the terms of section 69 (1) of the Act which contemplates selling of the mortgaged property itself and not any particular interest in the property.

Sub-section (4) of section 69 contemplates that any surplus money after appropriation of the amount due to the mortgagee will have to be paid over to the persons who are entitled to the mortgaged property. All these things taken together contemplate the power of sale of the mortgaged property as such or any part thereof and not sale of interest of any one of the mortgagors in the property in question. Therefore, the legal position flowing from the language of section 69 is that what is contemplated by that section is the sale of the mortgaged property itself and not the interest of any one particular mortgagor. The section itself does not contemplate any such thing and does not insist upon any notice mentioning that it is only the particular mortgagor's interest or even a particular person's interest that will be sold. On the other hand, the section contemplates the sale of the mortgaged property itself.

9. Secondly, as far as the present case is concerned, I have extracted the relevant portion of Exhibit A-3 in full. It does not state that it is only the interest of the mortgagors in the property whose names have been mentioned in the notice which is proposed to be sold. On the other hand the notice clearly says that the mortgaged property itself will be sold. Simply because the notice states that the property will be sold " at the risk and responsibility of " the persons whose names are mentioned therein and who are really the mortgagors, it cannot be stated that the notice contemplated sale of interest of the specified individuals in the property and not the property as a whole. The stand for which Mr. Ramanujachari, is contending, namely, that what was sold pursuant to Exhibit A-3 was only the interest of the persons mentioned therein is not borne out by the language of Exhibit A-3 itself. Consequently, a combined reading of section 69 of the Transfer of Property Act as well as the language of Exhibit A-3 will clearly show that what was sold was only the mortgaged property and not the interest of the individuals, whose names have been specified in Exhibit A-3.

9. As far as the legal position is concerned, it is settled. I have already referred to the concession of Mr. Ramanujachari, himself that the appellants were not born on the date of Exhibits A-1 and A-2 mortgages, that they are not questioning the mortgages and that is why they are seeking to redeem the mortgages. It is contended that since they came into existence in between the date of execution of the mortgages and the date of sale of the property, they acquired an interest in the equity of redemption and that the said interest did not pass under the sale to the second defendant pursuant to Exhibit A-3. In my opinion, once it is conceded that the appellants were not born on the date of the mortgages, Exhibits A-1 and A-2, and consequently the mortgages are binding on them, it will as a matter of corollary, follow that the conferment of the power on the mortgagee to sell the property is equally valid and binding on the appellants herein and the subsequent exercise of that power also is binding on the appellants herein. This conclusion flows from the general principles underlying the provisions contained in section 69 of the Transfer of Property Act. That question came to be considered by a Bench of this Court in *Paramanand Doss Chota Dass and Sons, A Firm of Merchants at Madras and others* v. *Nannulal Kanji and others*[1]. In that case, a learned Judge of this Court on the original side held that section 69 of the Transfer of Property Act did not apply to a manager of a joint Hindu family. That conclusion of the learned Judge was reversed on appeal by a Bench of this Court in the judgment referred to above. The Bench pointed out that the power to authorise private sale of the property for realising the mortgage amount is a power incidential to the creation of the mortgage itself. The Bench quoted the observation of Romilly, M.R., in *Russell* v. *Plaice*[2] where the learned Master of the Rolls had stated that the right to create a power to sell a property is incidental to the authority of the executor to mortgage the property itself. The same view was expressed by the same learned Master of the Rolls in another case *Bridges* v. *Longmead*[3], wherein it is stated :

1. (1941) 2 M.L.J. 923 : 54 L.W. 656 : I.L.R. (1942) Mad. 287 : A.I.R. 1942 Mad. 232.
2. (1854) 52 E.R. 9.
3. (1857) 53 E.R. 267.

"I think that no objection can be taken before me that the power of mortgaging was executed by means of a mortgage, which contained a power of sale, because I think that such a power is incident to the power to mortgage unless expressly excluded."

These views of the English Courts were approved and applied by the Privy Council in *Niamal Rai* v. *Din Dayal*[1]. In *Kanhayalal* v. *The National Bank of India Ltd.*[2] the Privy Council held that a power of sale embodied in a mortgage of property situate in a part of India where the Transfer of Property Act did not apply was a lawful provision and that this was on the basis that a power to authorise a mortgagee to sell the property privately for the purpose of realising the mortgage money was a power incidental to the creation of the mortgage itself. After referring to these judgments the Bench of this Court summarised the legal position in the following terms :

"Therefore, we have these facts in favour of the contentions of the appellants : (1) Section 69 applies to Hindus and there is no indication in the Act that the Legislature intended to exclude a mortgage created by the managing member of an undivided Hindu family; (2) the power to mortgage in itself implies a power in the mortgagor to confer upon the mortgagee a right to sell the mortgaged property without the intervention of the Court; and (3) the manager of an undivided Hindu family has the power to sell as well as to mortgage."

Consequently, the inference to be drawn from the above discussion and the above observation is that the power to authorise a mortgagee to sell the property privately for realising the mortgage money being a power incidental to the creation of the mortgage and being implied in the power to create the mortgage itself, the appellants herein cannot question the power conferred on the first defendant mortgagee to sell the property privately any more than they can challenge the creation of the mortgage itself, since admittedly they were not in existence on the relevant date. If the conferment of the power on the mortgagee to sell the property is valid, and beyond challenge by the appellants, since they were not born at the time of the mortgages, it logically follows that the exercise of that power so long as that power has been properly exercised according to the procedure prescribed by law, cannot be called in question by the appellants.

1. (1927) 54 I.A. 211 : 52 M.L.J. 729 : A.I.R. 1927 P.C. 121.
2. 45 M.L.J. 497 : 75 I.C. 7 : (1923) 50 I.A. 162 : A.I.R. 1923 P.C. 114.

10. There is another way of looking at the matter. The appellants have prayed for a decree for redeeming the mortgages. It is settled law that once the power of sale has been exercised and the sale has been concluded the mortgage has come to an end and the equity of redemption has been extinguished and there is nothing to be redeemed thereafter. That is the view taken by a Bench of this Court which went to the extent of stating that even if there is no regular deed of conveyance in respect of the mortgaged property in favour of the purchaser, once the purchaser has paid the money and the mortgagee has received the money due to him, the mortgage stands discharged and therefore is no mortgage to be redeemed thereafter. In *K. Narayana Rao* v. *Meenakshi Velu and others*[1], a Bench of this Court stated :

"We are, however, unable to subscribe to the view that, only as and when the sale is completed by a registered instrument, extinguishment of the right to redemption is brought about. That certainly is one way by which the right to redemption may be extinguished. But there may be other acts of parties which, in the light of facts and circumstances, may well be held to have extinguished the right to redemption. The right to redemption is not always controlled by conveyance in accordance with law. Section 60 of the Transfer of Property Act defines the right of a mortgagor to redemption.

1. (1973) 2 M.L.J. 467 : 86 L.W. 736 : A.I.R. 1974 Mad. 158.

> But the proviso to this section suggests that the right conferred by the section may be extinguished by act of parties or by decree of Court ....
>
> ....
>
> .... When the mortgagor gave the power of sale to the mortgagee under section 69 of the Transfer of Property Act, the mortgagee exercised that power and, when the purchaser paid the money which, as we said, has been distributed, that would certainly have the effect of discharging the mortgage. The mortgagee having been paid the mortgage debt, the mortgage came to an end and with that, the mortgagor's right to redemption."

If by the sale of the property and the second defendant paying the amount and the first defendant receiving the money, the mortgage has been discnarged, there is no question of redeeming such a discharged mortgage and therefore the appellants cannot claim a decree for redemption in the present suit.

11. There is one other circumstance which has to be noticed in this behalf. In the plaint, the appellants in this case prayed for the redemption of the entire mortgages, both under Exhibits A-1 and A-2. As I have pointed out already, the learned counsel for the appellants conceded that the mortgages were binding on the appellants but he was questioning the sale and seeking to redeem the mortgages only on the ground that what was sold pursuant to the power exercised under section 69 of the Transfer of Property Act was the interest of the mortgagors and not the interest of the appellants in the equity of redemption, since the appellants were born in between the creation of the mortgages and the sale of the property. Once it is conceded by the learned counsel for the appellants that what was sold under the sale in exercise of the power under section 69 was only the interest of the enumerated mortgagors and not the interest of the appellants, it will clearly follow that the appellants will not be entitled to claim to redeem the mortgages to the extent of the share of the said enumerated mortgagors in the equity of redemption. Mr. G. T. Ramanujachari, the learned counsel for the appellants, submitted that since the appellants cannot claim to redeem the mortgages partially, they have prayed for redemption of the entire mortgages. I am of the opinion that this argument is against the appellants rather than in favour of them. Simply because the mortgages cannot be redeemed in part and have to be redeemed in whole, it does not follow that the appellants will have a right to ignore even the valid sale of the interest of those mortgagors in the mortgaged property and to purport to claim redemption of the entire mortgages. If the contention that the appellants cannot redeem the entire mortgages is sound, it will only follow that since a portion of the property had been validly sold, even on the assumption that their interests were not sold, the appellants cannot claim to redeem the mortgages at all and the only right of the appellants, if at all, would be to share the surplus of the sale proceeds, if any, as provided for in sub-section (4) of section 69 of the Transfer of Property Act.

12. Hence, looked at from any point of view, the appellants cannot succeed with regard to the relief of redemption of the mortgages which they have prayed for.

13. No other point was urged before me.

14. Under these circumstances, the appeal fails and is dismissed with costs, counsel's fee — separate sets.

S.J. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*S. Mohan, J.*

Periasami Servai and another .. *Appellants**

v.

Alagu Servai and others .. *Respondents.*

and

Krishnan Servai .. *Appellant*

v.

Alagu Servai and others .. *Respondents.*

Civil Procedure Code (*V of* 1908), *Order* 41, *rule* 2—*Second Appeal—Ground not raised in memorandum but argued —Material on record by way of admission by witness—Appellant allowed to raise ground.*

The Plaintiff had admitted in cross-examination that he was an undischarged insolvent. The maintainability of the suit on this ground was not questioned before the lower appellate Court and there was no specific ground in the second appeal. But the appellant argued this point and this was objected to by the respondent.

Held, no objection could be taken, as there was material on record in the form of the admission of P.W. 1 and it was but necessary that the appellant should be given a chance to raise this ground and be permitted to argue. [*Para.* 10.]

Cases referred to :

Khadir Bi v. *Mamoodunnissa Begum,* (1973) 2 M.L.J. 36 : 86 L.W. 173 : A.I.R. 1973 Mad. 346 ; *Chinniya Pillai* v. *Subbaratnam Pillai,* (1940) 2 M.L.J. 590 : 52 L.W. 527 A.I.R. 1941 Mad. 22 ; *Bhadramma* v. *Parvateesam,* 63 M.L.J. 414 : 139 I.C. 574: 36 L.W. 655: A.I.R. 1932 Mad. 731: *Subbiah Goundan* v. *Ramaswami Goundan,* (1953) 2 M.L.J. 766 : I.L.R. (1954) Mad. 80 : A.I.R. 1954 Mad. 604 ; *Akkayya* v. *Appayya,* (1947) 1 M.L.J. 4 : I.L.R. (1947) Mad. 661 : 60 L.W. 15 : A.I.R. 1947 Mad. 238; *Suryanarayanamurthi* v. *Veeraju,* (1945) 1 M.L.J. 292 : I.L.R. (1946) Mad. 45: 58 L.W. 150 : A.I.R. 1945 Mad. 257 : *Sabarianandan Nadar and another* v. *Chellachi Nadachi and another* (L.P.A. No. 2 of 1968).

*S.A. Nos. 730 of 1972 and 659 of 1973.
11*th April,* 1975.

Appeals against the decree of the Court in Appeal Nos. 37 and 97 of 1971 respectively before Subordinate Judge, Sivaganga against the decrees of the Court of the District Munsif of Sivaganga, in O.S. No. 207 of 1966.

K. Rajasekaran, N.K. Natarajan and *S. Mohan,* for Appellant.

S. Varadarajulu Naidu, for Respondent.

The Court delivered the following

JUDGMENT.—These two second appeals arise out of O.S. No. 207 of 1966 filed before the District Munsif of Sivaganga, for a declaration and injunction.

2. There are two items, which form the suit properties. One is a vacant site, C.C1. B-3, as shown in the plaint rough plan, which is triangular in shape, and the other marked D.D1. B1. B-2. The suit is filed on behalf of the plaintiff and defendants 6 to 9 as ancestral properties. The claim is further based upon adverse possession.

3. In defence , it was contended that the entire property was surveyed as T.S. No. 11 and an extent of 56 cents belonging to the first defendant was acquired for the formation of the Railway feeder road, C. C1 B3 portion was surveyed as part of Survey No. 48/2 and it belonged to the first defendant. D, D1 B1 B2 portion belonged to defendants 2 to 5. The basis of the defendants' claim is by adverse possession.

4. The trial Court decreed the suit on a consideration of the oral and documentary evidence, whereupon defendants 2 to 5 preferred A.S. No. 37 of 1971 and the first defendant preferred A.S. No. 97 of 1971. Both these appeals were dismissed by the learned Subordinate Judge, Sivaganga.

5. Second appeal No. 730 of 1972 is against A.S. No. 37 of 1971, while Second

Appeal No. 659 of 1973 is against A.S. No. 97 of 1971.

6. One of the important points in the second appeal, which has not been adverted to by both the Courts below, presumably because this was not raised, is what is the effect of the admission by the plaintiff that he is an undischarged insolvent. This will be material with regard to two aspects, *viz.* (1) the maintainability of the suit or at any rate, as regards his share; and (2) whether he could plead adverse possession as against the Official Receiver.

7. The learned counsel for the appellant draws my attention to the evidence of P.W. 1 who, in cross-examination says: "I am an undischarged insolvent. I had no revesting order from the Official Receiver. The Insolvency Petition was dismissed as I did not take further steps. I did not move the Court for the withdrawal of the petition and for revesting of the properties from the Receiver."

8. On this, it is argued that he remained an undischarged insolvent and certainly the suit cannot be maintained, even though the claim is on behalf of the plaintiff and defendants 6 to 9. The further submission is that he cannot prescribe adverse possession as against the Official Receiver.

9. As against this, Mr. S. Varadarajulu Naidu, submits that at this stage the appellant should not be allowed to raise this ground since it was not raised either in the Memorandum of grounds of the appeal before the lower Appellate Court, or even in the present second appeal.

He refers to the evidence in chief-examination of the plaintiff (P.W. 1) wherein it is stated: "The Insolvency petition was dismissed and I paid for the debts" and on this basis it is contended that there is no such thing as dismissal of the insolvency petition under the Provincial Insolvency Act. This would only mean that the insolvent was discharged, more so, when all the debts had been paid off. In this connection, my attention is drawn to sections 28 (2), 37 and 43 of the Provincial Insolvency Act and also a number of decided cases to support the argument that no revesting order is necessary, having regard to the long lapse of time and having regard to the inaction of the Official Receiver, it must be deemed that the plaintiff was no longer an insolvent.

10. I will first dispose of the submission that the appellant should not be allowed to raise this ground, at this belated stage. No doubt there is no specific ground either before the lower Appellate Court, or in the second appeal. But, since no objection could be taken, as there is material on record in the form of the admission of P.W. 1, it is but necessary that the appellant should be given a chance to raise this ground, and therfore, I permitted him to argue.

11. In order to appreciate these arguments pertaining to law, it is necessary to refer to the following three sections of the Provincial Insolvency Act. They are sections 28, 37 and 43. The effect of these sections, to put it shortly, would be that as soon as an order of adjudication is made, the entire property of the insolvent vests in the Official Receiver. Until the adjudication is annulled, whatever acts were done by the Official Receiver, they would be valid. Where on the day appointed for considering the application of discharge, if the debtor does not appear, the Court may pass such order as it thinks fit. On the basis of this section, it is contended that no specific order of revesting is necessary. It may be so. But, in this case, what is required to be decided is whether the so-called dismissal would enable the learned counsel for the respondents to contend that the insolvency proceedings got terminated. In other words, whether the insolvent ceases to be so.

12. The first case that is cited before me is *Khadir Bi.* v. *Mamoodunnissa Begum*[1] where the insolvency was in 1935. The properties of the insolvent vested in the Official Receiver on his adjudication. The absolute discharge was granted in 1938. Full payment was not made to the creditors. But neither the Official Receiver nor any of the creditors took any steps seeking to bring the properties to sale to satisfy the claims of the creditors in full.

1. (1973) 2 M.L.J. 36 : 86 L.W. 173 : A.I.R. 1973 Mad. 346.

During all the period the insolvent and his heirs after his death were in possession and enjoyment of the suit properties.

13. In a suit for partition by the legal representatives of the insolvent, when some of the defendants contended that notwithstanding the discharge, the properties never reverted or revested in the insolvent, and that the co-tenancy or co-ownership between the brothers had been extinguished by the insolvency, it was held that even though there was no order revesting the properties in the insolvent after the absolute discharge order was made, by reason of the inaction of the Official Receiver and the creditors, the properties of the insolvent have revested in the heirs of the insolvent. The contention that in the absence of any revesting order, the insolvent loses his title to the properties is therefore, untenable.

14. This case is easily distinguishable; since there was an order of absolute discharge passed in the year 1938. Hence, this does not support the respondent. There was also no such evidence in this case.

15. As to what is the meaning of an undischarged insolvent for the purpose of the then Madras Local Boards Act, came up for consideration in *Chinniya Pillai* v. *Subbaratnam Pillai*[1], and it was held :

> "Annulment of adjudication on whatever ground it is based, must be taken to put an end to the legal character of an insolvent which adjudication under the Act confers upon a debtor and a person whose adjudication is annulled under section 43 cannot therefore be held to be an 'undischarged insolvent' disqualified for election to a Local Board under Madras Local Boards Act, section 55 (2) (*b*). The meaning of 'undischarged insolvent' in section 55 (2) (*b*) of the Local Boards Act cannot be controlled by anything contained in section 73 of the Provincial Insolvency Act."

16. This has no relevance to the case on hand, since it was argued there that mere annulment would be of no consequence.

1. (1940) 2 M.L.J. 590 : 52 L.W. 527 : A.I.R. 1941 Mad. 22.

But, there must be a specific order of discharge.

17. As to the effect of annulment, the following two decisions *viz.*, *Bhadramma* v. *Parvateesam*[1] and *Subbiah Goundan* v. v. *Ramaswami Goundan*[2] are pressed into service. These cases again, have no application.

18. *Akkayya* v. *Appayya*[3], is yet another decision which is relied on. I find by a reading of that decision that it was only the question of limitation that came up for consideration and, therefore that again is inapplicable.

19. Lastly, reliance is placed on *Suryanarayanamurthi* v. *Veeraju*[4]. In that case it was held that an insolvent co-parcener's share of property does not cease to be joint family property while it is vested in the Official Receiver merely because the other co-parceners lose their right of survivorship in the share or because it is not divested from the Official Receiver on the insolvent's death. When the purpose for which the law places a fetter on the coparcenary interest (namely, for satisfying the claims of the coparcener's creditors) has been fulfilled, the surplus of such interest must partake of the same character as the interest divested by the adjudication as insolvent. Accordingly on reverter under section 37 of the Provincial Insolvency Act, on annulment of the adjudication of a member of a Hindu joint family his assets in the hands of the Official Receiver, come back to him as joint family property and not as his separate property.

20. There again, it has to be noted that, on the annulment of adjudication, as to what would be its effect on the insolvent's share was the question that came up for consideration. But, in this case, as seen above, there is no evidence as to the fate of the insolvency proceedings. Moreover, the question here is whether the erstwhile insolvent could prescribe title adversely as against the Official Assignee.

1. 63 M.L.J. 414 : 139 I.C. 574 : 36 L.W. 655 : A.I.R. 1932 Mad. 731.
2. I.L.R. (1954) Mad. 80 : (1953) 2 M.L.J. 766 : A.I.R. 1954 Mad. 604.
3. I.L.R. (1947) Mad. 661 : (1947) 1 M.L.J. 4 : 60 L.W. 15 : A.I.R. 1947 Mad. 238.
4. I.L.R. (1946) Mad. 54 : 58 L.W. 150 : (1945) 1 M.L.J. 292 : A.I.R. 1945 Mad. 257.

21. The learned counsel for the appellant relies on the judgment of this Court in *Sabarianandan Nadar and another* v. *Chellachi Nadachi and another* [1]. This again has no application to the present case.

22. So, in order to effectively and properly adjudicate the rights of the parties, I think that the interests of justice require that the matter should be remanded to the trial Court for fresh consideration on the limited question as to how and when the insolvency proceedings came to an end, or whether the first respondent herein continues to be an undischarged insolvent. If the latter is the case, the question as to whether the suit could be maintained by him even though it is filed on behalf of himself and defendants 6 to 9 and whether adverse possession could be pleaded as against the Official Receiver, are matters which require to be decided. If necessary, the trial Court will frame an issue in this regard and proceed to determine the same upon oral and documentary evidence, which is already on record and which may be filed or let in by the parties hereafter, for which I grant liberty. It is needless for me to point out that the Court below will decide the matter, uninfluenced by any of the observations on the question of law and the case law cited by either side.

23. In the result, the second appeals are allowed and the case will be remanded to the trial Court (District Munsif Court) for fresh disposal in the light of the above observations. The appellant will be entitled to refund of Court-fee in both the second appeals. Costs will abide the result of the suit. No leave.

S.J. ——— *Appeals allowed.*

1. L.P.A. No. 2 of 1968.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Mohan, J.*

Thayyanayaki Ammal and others .. *Appellants**

v.

Venugopala Pillai by agent and brother K. V. Ramu and others .. *Respondents.*

(A) *Hindu Succession Act* (*XXX of* 1956), *section* 14—*Suit for declaration—Widow's right in suit property—Compromise in prior suit before* 1956—*Widow getting limited estate—Whether right enlarges under Act XXX of* 1956—*Scope of section* 14 (1) *and* (2).

The law is well-settled that if a compromise, or award, or deed, etc., is the source or the foundation of the right of the widow, restrictions prescribed thereunder would govern and to such a case, section 14 (2) of the Act XXX 1956 alone would apply. On the contrary, if what the compromise, award or the document does is nothing more than to restate the law as it then stood, the intervention of the same will not affect the rights of the widow, in which event section 14 (1) will apply. It is also well-settled that section 14 (2) is in the nature of an exception to section 14 (1). [*Para.* 18.]

In the instant case, the compromise decree prescribed a restricted estate and it did not acknowledge or recognise the widow's pre-existing right, and therefore, section 14 (2) alone applied. [*Para.* 24]

(B) *Transfer of Property Act* (*IV of* 1882), *sections* 10 *and* 11—*Compromise in suit—Not a transfer—Sections* 10 *and* 11 *cannot be applied.*

There is no scope for applying section 10 and 11 of the Transfer of property Act to a compromise, since a compromise is not a transfer.

[*Para.* 26.]

Cases referred to :

Badri Pershad v. *Kanso Devi*, (1970) 2 S.C.J. 114: (1970) 2 S.I.R. 95: A.I.R. 1970 S.C.

*S.A. No. 814 of 1972.

20th March, 1975.

1963; *Seetharama Pillai* v. *Seyu Pillai* (1970) 83 L.W. 226; *B.B. Patil* v. *Gangabai*, A.I.R. 1972 Bom. 16; *Karmi* v. *Amru*, (1971) S.C.D. 274: A.I.R. 1971 S.C. 745; *Hussain Uduman* v. *Venkatachala Mudaliar*, (1974) 2 M.L.J. 275: 87 L.W. 583: A.I.R. 1975 Mad. 8; *Thomas* v. *Thomas*, (1855) 110 R.R. 107 (110): 25 L.J. Ch. 159; *Doed Milner* v. *Brightwen*, (1809) 10 East. 583 (594): 103 E.R. 897.

Appeal against the decree of the District Court, South Arcot dated 10th September, 1971 and passed in Appeal Suit No. 50 of 1968, preferred against the decree of the Court of the Subordinate Judge of Chidambaram in Original Suit No. 61 of 1966.

M.S. Venkatarama Iyer, V. Krishnan and *K. Sankaran*, for Appellant.

K. Gopalachari and *G. Krishnan*, for Respondents.

The Court delivered the following

JUDGMENT.—The Plaintiffs, who were unsuccessful in both the Courts below, have preferred this Second Appeal. They filed O.S. No. 61 of 1966 before the Subordinate Judge, Chidambaram, for possession of the suit properties on the following allegations.

2. One Sarangapani Pillai, the adopted son of Arunachalam Pillai of Adoor, died in 1921, when he was very young, leaving behind his widow, Arumbu Ammal, and a daughter Valliammai. Prior to his death, he executed an unregistered will on the 10th of February, 1921, whereunder he gave a life estate over the suit properties in favour of Arumbu Ammal, and after her life-time, the properties were to be taken in equal moieties by his minor daughter and Balakrishna, the brother of the testator. The will further recited that in the event of Valliammai dying without male issues, the heirs of Balakrishna would take the moiety of Valliammai also.

3. One, Soumathachi filed O.S. No. 750 of 1922 on the file of the District Munsif's Court, Kattumannargudi, against the widow and daughter of Sarangapani on the foot of a promissory note executed by Sarangapani, for the recovery of a sum of Rs. 2,500. In that suit, Balakrishna was also impleaded as a party-defendant. The widow and the daughter contested the suit stating that the promissory note was a forgery. While Balakrishna proclaimed the will, for the first time, he set up the defence that as per the terms of the will, he was not liable. Though that suit was decreed by the trial Court, in appeal, it was dismissed. In the meanwhile the widow and the daughter, having become aware of the will of Sarangapani, filed O.S. No. 255 of 1923 before the District Munsif's Court of Kattumannargudi for a declaration that the will was a forgery and that it would not alter the right of succession to the estate of Sarangapani. In that suit, a compromise was entered into on 27th of July, 1924 (Exhibit-A-4), whereunder Balakrishna relinquished his half share in the estate and it was stipulated that the widow should enjoy the property for life, as a widow's estate, without any powers of alienation, and after her, her daughter should enjoy the same, as a daughter's estate, without powers of alienation and the male heirs of the daughter will take the properties absolutely, after her life time, and if the daughter leaves no male heirs, Balakrishna's heirs would take them absolutely.

4. The daughrer of Valliammai, died in 1940 without any issues. Therefore, Arumbu Ammal took in adoption the first defendant, Venugopal, on 3rd November, 1947 and executed a deed of adoption, which was registered (Exhibit B-1). Balakrishna died on 8th January, 1963. On 7th May, 1966, Arumbu Ammal executed a deed of settlement in favour of her adopted son conveying some items of the properties under Exhibit B-2 and put him in possession. She executed a will (Exhibit B-3), on 9th May, 1966 bequeathing all her movables and outstandings and also the properties not covered by Exhibit B-2, in favour of the adopted son. The said adopted son is the first defendant. Arumbu Ammal died on 16th May, 1966. Thus, the first defendant Venugopal became entitled to all the properties and he is in possession of the same through the tenants, defendants 2 to 6.

5. Plaintiffs 1 to 3 are the daughters and the 4th defendant is the widow of late Balakrishna, the natural brother of Saran-

gapani. It is their contention that under the compromise decree, Exhibit A-4, Arumbu had only a limited estate. Therefore, on her death, they would be entitled to the suit properties. The settlement deed and the will, Exhibits B-2 and B-3, cannot convey any valid title in favour of the first defendant, and by reason of Central Act XXX of 1956, Arumbu does not become a full owner. Hence, the suit.

6. The first defendant, the adopted son raised, *inter alia* the following contentions.

7. The will of Sarangapani, dated 10th February, 1921 is a forgery. The compromise was brought about by fraud, and undue influence, and, therefore, not binding. Assuming that the compromise was binding, it only re-affirmed the provisions of the will and consequently in view of section 14 (1) of Central Act XXX of 1956, she became a full owner of the estate, which she could validly convey in favour of the first defendant and this is what she did under Exhibits B-2 and B-3. Therefore, his title to the properties cannot be impeached, and he was validly in possession through his tenants.

8. The tenants, *viz*., defendants 2 to 6 raised the plea that they were entitled to protection under the Tamil Nadu Cultivating Tenants Protection Act (Tamil Nadu Act XXV of 1955).

9. The learned Subordinate Judge found that the will dated 10th February, 1921 is true, the compromise decree in O.S. No. 255 of 1963 is binding on the widow, Arumbu, and what was given to her under that compromise was a widow's estate, which became enlarged into an absolute estate by virtue of section 14 (1) of Act XXX of 1956, and therefore, she had every right to execute the settlement and Will, *viz*., Exhibits B-2 and B-3. Consequently the first defendant had valid title and his possession could not be interfered with. On this reasoning the suit was dismissed.

10. Thereupon, A.S. No. 50 of 1968 was filed before the District Judge of South Arcot at Cuddalore, wherein the findings of the trial Court were confirmed. Hence, the present second appeal.

11. Mr. M.S. Venkatarama Iyer, argues, the summary of which is as follows :

(1) The construction placed by both the Courts below on Exhibit A-4 is totally incorrect.

(2) On a reading of the entire compromise, together with the clauses under the Will, dated 10th February, 1921, *viz*., Exhibit A-1, it would be clear that what Arumbu got was a restricted estate, in which event, section 14 (2) of the Hindu Succession Act, 1955 (hereinafter referred to as the Act) alone would come into play.

(3) Once the Will has been found to be true, as has been done in the instant case, by both the Courts below, the possession of Arumbu must relate only to the Will dating back to the date of the death of the testator.

(4) It is only by virtue of the compromise that Arumbu got this estate, and that being the foundation of her right, title and interest, it cannot be said that section 14 (1) would apply and her estate would become enlarged into an absolute one.

(5) This being a compromise the restrictions contained under sections 10 and 11 of the Transfer of Property Act, cannot apply.

12. Mr. K. Gopalachari, learned counsel for the respondents, in meeting the above, raised the following contentions, which in brief, could be noted as follows:—

(1) The compromise, Exhibit A-4, recognises only the pre-existing rights of the widow and it does not, in any manner, restrict her rights. (2) The intention in the minds of the parties in 1924 should be ascertained, in order to find out the true effect of the compromise. (3) Merely because the Will has been upheld in these proceedings, it would not mean that the possession of the widow is traceable to the Will, and, therefore, her rights would remain unaffected. (4) If what Arumbu got under Exhibit A-2 was a widow's estate, by virtue of her being in possession, it would become enlarged into an absolute estate, by the operation of section 14 (1) of the Act.

13. I will take up these points seriatim. The first question that arises for determination is the construction to be placed on

Exhibit A-4, in order to appreciate the scope and effect of the compromise. The provisions of the Will in question, Exhibit A-1, dated 10th February, 1921 may be taken note of. That reads:

> ''எனக்கு பாத்யமான ஸ்தாவரசங்கம சொத்துக்கள் யாவற்றையும் என் சீவதிசைக்கு பிறகு என் பெண்சாதி ஷை அரும்பு அம்மாள் அனுபவித்து அவருக்கு பிறகு ஷை என் குமாரத்தி வள்ளியம்மையும் என் ஜனன சகோதரரான ஆடூர்........ குமாரர் பாலகிருஷ்ண பிள்ளை சர்வ சுதந்திர பாத்தியத்துடன் தானாதி வினிமிய விக்கிரயங்களுக்கு யோக்கியமாய் ஆண்டனுபவித்துக்கொள்ளுகிறது, அப்படி ஒருவாறு ஷை பெண் வள்ளியம்மைக்கு ஆண் சந்ததியில்லாமல் இறந்து போகும் பக்ஷத்தில் ஷை பாலகிருஷ்ண பிள்ளை வார்சுகள் அடைந்து தானாதி வினிமிய விக்கிரயங்களுக்கு யோக்கியமாய் ஆண்டனுபவித்துக்கொள்கிறது.''

It would be seen that Sarangapani, under this Will, gave a life estate to his wife and after her life, the daughter Valliammai, and brother Balakrishna were conferred an absolute right and in the event of Valliammai dying without any male issues, the entire property would devolve absolutely on Balakrishna. It was this Will, which was challenged in O.S. No. 255 of 1923. That suit, as seen above, resulted in a compromise which I extract in full, for a proper appreciation of the respective contentions:

> மகா.ள.ள. ஸ்ரீ மன்னார்குடி டி. மு. கோர்டார் அவர்கள் ஸமுகத்துக்கு ஓ.எஸ். 255 ஆப் 1923 வாதிகள் 1. அரும்பு அம்மாள் 2. மைனர் வள்ளியம்மை அடுத்த சினேகிதி முதல் வாதி பிரதிவாதிகள் 1. பாலகிருஷ்ண பிள்ளை. 2. மங்களம்மாள் மேற்படி நம்பரில் வாதிகளும் முதல் பிரதிவாதியும் கொடுத்த ராஜிநாமா சி.பி.சி. ஆர்டர் 23 இ ஆர்-3 முதல் வாதி புருஷன் சாரங்கபாணி பிள்ளையால் 10-1-21-ல் எழுதி வைக்கப்பட்டிருக்கும் உயில் ஷரத்துக்களை அனுஸரித்து மேற்படி (testator) உடையயாவத்து சொத்துக்களையும் முதல் வாதி அவள் ஜீவதிசை பரியந்தம் (Widow's estate போல்) யாதொரு பராதீனமும் செய்யாமல் அனுபவித்துக் கொள்ளுகிறதென்றும் மேற்படி உயில் மூலமாய் முதல் வாதியின் ஜீவதிசைக்குப் பிறகு முதல் பிரதி வாதிக்கு கிடைத்திருக்கும் பாதி பாத்தியதையை முதல் பிரதி வாதி 2-வாதிக்கு செய்து விட்டபடியால் முதல் வாதிக்கு பிறகு 2வது வாதியே யாதொரு பராதீனமும் செய்யாமல் (daughter's estate போல்) மேற்படி உடைய சொத்துக்கள் யாவற்றையும் அனுபவித்துக்கொள்ளுகிறதென்றும் அப்படி ஒருவாறு 2-ம் வாதிக்கு ஆண் சந்ததியில்லாமல் 2-வது வாதி இறந்து போகும் பட்சத்தில் மேற்படி (testator) உடையயாவத்து சொத்துக்களையும் முதல் பிரதி வாதியும் அவனுடைய வார்சுகளும் சர்வ சுதந்திரமாக அடைகிறதென்றும் 2-வது வாதிக்கு ஆண் சந்ததி உண்டானால் (testator) உடைய சொத்துக்களை அந்த ஆண் சந்ததி சர்வ சுதந்திரமாக அடைகிறதென்றும் உபய வாதிகளும் அவரவர்கள் சிலவை அவரவர்கள் பொறுத்துக் கொள்ளுகிறதென்றும் 2-வது பிரதிவாதிக்கு அவள் ஜீவநாம்ச டிக்ரிப்படி ஜீவநாம்சம் கிடைக்கிறதென்றும் 2-வது வாதிக்கு ஆண் சந்ததி இல்லாமல் 2-வது வாதி இறந்து போகும் பட்சத்தில் உயில் படி முதல் பிரதி வாதி (testator) உடைய பூரா சொத்துக்களையும் சர்வ சுதந்திரமாக அடைவதில் 2-வது வாதிக்கு பெண் சந்ததி உண்டாகியிருந்தால் முதல் பிரதி வாதியும் அவனுடைய வார்சுகளும் மேல் கண்ட பிரகாரம் அடையும் சொத்துக்களிலிருந்து 3 காணி நிலம் மேற்படி 2-வது வாதியின் பெண் சந்ததிக்கு விட்டுக்கொடுக்கிறதென்றும் ராஜியாயிருப்பதால் அந்தப்படி டிக்ரி செய்ய வாதிகளும் முதல் பிரதி வாதியும் பிரார்த்திக்கிறார்கள். பாலகிருஷ்ண பிள்ளை என்று இந்த கிறல், அரும்பு அம்மாள் கைநாட்டு என்று 2-ம் பிரதி வாதிக்கு மைனர் கார்டியன் முறைமையிலும்.''

14. The points that require to be noted concerning this Exhibit (4) are: (1) This compromise is in accordance with the provisions of the Will. That is clear because it states ''உயில் ஷரத்துக்களை

அனுசரித்து'' (2) Broadly speaking, it confers a life estate, without powers of alienation. I say 'broadly speaking', since the entire controversy centres round as to what is the nature of the estate conferred on her.; (3) Balakrishna relinquishes his rights made available under the Will, after the lifetime of Arumbu. (4) Valliammai, the daughter is confered a 'daughter's estate', without powers of alienation; (5) In the event, the daughter died without male issues, Balakrishna would take the property absolutely.

15. The fervent plea of Mr. K. Gopalachari is, having regard to the law that was prevalent in 1924 and further, having regard to the fact that the compromise was drafted by men of law, the "widow's estate" must be given the proper meaning. According to him, under the law, as it stood then, the widow took a life estate without powers of alienation, excepting for necessities, and it was this, which came to be incorporated, stating: ''ஜீவ திசை பரியந்தம்' (Widow's estate போல) யாதொரு பராதீனமும் செய்யாமல் அனுபவித்துக்கொள்கிறதென்றும்'. Whatever restrictions, the widow had with regard to the alienations under Hindu Law, they alone would prevail and it cannot be contended that under no circumstances, the widow could alienate, even for necessities, since it is said that "widow's estate போல?".

16. The forceful reply of Mr. M.S. Venkatarama Iyer is that such a construction ignores very many aspects.

(*i*) Exhibit A-1 is the fore-runner (*ii*), The language employed is ''யாதொரு பராதீனமும்'', which means "no alienation whatsoever". (*iii*) Vested remainders have been conferred upon the daughter and also Balakrishna.

17. On a careful consideration of the above arguments, I am inclined to hold the Mr. M.S. Venkatarama Iyer is right in his submissions, because the construction sought to be placed by Mr. Gopalachari would be only highlighting the rights of Arumbu, while all the other provisions would be rendered nugatory. It is not necessary, as Mr. Gopalachari contends, that the widow should stand benefited by the compromise. Even assuming that to be so, the benefit that is conferred on her is the vested reminders in favour of the daughter and Balakrishna. As is well-known in a compromise, there is always give and take. Balakrishna relinquished his rights obtained under the Will, Exhibit A-1, while Arumbu was content with a lifeestate, without any power of alienation (including for legal necessities). In my view the accent should be on the words ''யாதொரு பராதீனமும்'' and the proper meaning to the ascribed to the words "widow's estate போல'' is enjoyment for life. This conclusion is fortified since as seen above, the compromise itself was in harmony, or in accordance with the provisions of the Will. Therefore, the conclusion, to my mind is that what was conferred on Arumbu was only a restricted estate, as otherwise, if it were to be held that it is a widow's estate, it would defeat the latter clauses in the compromise relating to conferment of remainders.

18. If this be the true position, what is the correct law that has to be applied, is the next question that has to be considered. Section 14 of the Act states as follows:—

"(1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

Explanation:—In this sub-section, 'property" includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as *stridhana* immediately before the commencement of this Act.

(2) Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil Court or under an award where the terms of the gift, will or other instrument or the decree, order or

award prescribe a restricted estate in such property."

Whatever doubts were there earlier, the law is well-settled in the present day, that if the compromise, or the award, or the deed, etc., is the source or the foundation of the right of the widow, restrictions prescribed thereunder would govern and to such a case, section 14 (2) alone would apply. On the contrary, if what the compromise, award or the document does is nothing more than to restate the law, as it then stood, the intervention of the same will not affect the rights of the widow, in which event, section 14 (1) will apply. It is also well-settled that section 14 (2) is in the nature of an exception to section 14 (1). I need hardly refer to any authority, excepting to quote the following passage from Mulla's Hindu Law (Fourteenth Edition—1974) at page 906:

"Thus for instance if the female Hindu had prior to the date of the decree title to the property and what the decree really does is to declare that title she cannot be said to have acquired the property under that decree. In order to invoke the application of this sub-section it is necessary to satisfy the essential condition that the instrument which limits or restricts the estate should itself be the source or foundation of the female's title to the property. If she had an existing interest in the property, the inter-position of any instrument will not affect the operation of sub-section (1). The instrument, for instance, may be a decree or order or deed or partition but if the pre-existing right was there, sub-section (2) cannot have the effect of taking the property out of the coverage of sub-section (1)".

and the ruling in *Badri Pershad* v. *Kanso Devi*[1], wherein it was held at page 1966:

"Sub-section (2) of section 14 is more in the nature of a proviso or an exception to sub-section (1). It can come into operation if acquisition in any of the methods indicated therein is made for the first time without there being any pre-existing right in the female Hindu who is in possession of the property".

1. (1970) 2 S.C.J. 114 : (1970) 2 S.C.R. 95: A.I.R. 1970 S.C. 1963.

19. In this case, therefore, under the compromise, Exhibit A-4, Arumbu took a restricted estate. She cannot, therefore, put forth the plea that she is absolutely entitled to the properties as per section 14 (1) of the Act. Nor, is it open to her to put forth the contention that she would not be bound by the restrictions prescribed under the compromise. The compromise, without declaring her pre-existing title, brought about the agreement between the parties conferring certain rights mentioned under that compromise, in which event, it would be binding upon the parties thereto.

20. Similar is the case of *Seetharama Pillai* v. *Seyu Pillai*[1], which decision, I have considered in detail under an earlier decision of mine in Second Appeal No. 671 of 1972, dated 4th March, 1975, *Nagarathnammal and another* v. *Peria Munuswamy Goundar and* 4 *others*[2]. The decision relied on by Mr. K. Gopalachari in *B.B. Patil* v. *Gangabai*[3], will be of no assistance to him.

21. In the final analysis, what emerges is, that under the compromise Arumbu took a life estate without any power of alienation whatsoever, and after her demise, the vested remainders fell upon the daughter and Balakrishna, and if this was the nature of compromise entered into between the parties, in 1924, the fact that she continued in possession even after the passing of the Hindu Succession Act, 1956, would not enable her to contend that section 14 (1) would apply. In my view, there is no necessity to cite much case law on this aspect and there is a pre-ponderence of the same, since as laid down by the Supreme Court in *Badri Pershad* v. *Kanso Devi*[4], the section has to be read as a whole and it would depend on the facts of each case whether the same is covered by the first sub-section or sub-section (2).

22. This is more or less a case like *Karmi* v. *Amru*[5], where a widow succeeded to

1. (1970) 83 L.W. 226.
2. S.A. No. 671 of 1972.
3. A.I.R. 1972 Bom. 16.
4. (1970) 2 S.C.J. 114 : A.I.R. 1970 S.C. 1963 at p. 1965.
5. 1971 S.C.D. 274; A.I.R. 1971 S.C. 745.

the properties of her deceased husband on the strength of a Will executed by her husband, under which only a life estate was conferred, it was held that she could not claim to have become an absolute owner under the Act, and this ruling also supports the submission of Mr. M S. Venkatarama Iyer, learned counsel for the appellants.

23. The proper test is in the words of the Division Bench in *Hussain Uduman* v. *Venkatachala Mudaliar*[1]:,

> "Before applying section 14 (2) of the Hindu Succession Act, the proper question to ask is: does the instrument or decree *prescribe* a restricted estate in the property or does it merely acknowledge and recognise (and not prescribe) a pre-existing estate upon which the Hindu Law had imposed a restriction, because the holder or the estate was a woman?"

24. In the instant case, my answer is that the compromise decree under Exhibit A-4 does prescribe a restricted estate and it does not acknowledge or recognise her pre-existing right, and therefore, section 14 (2) alone applies. The Courts below are wrong in holding that by application of section 14 (1), the widow's estate became enlarged into an absolute one.

25. The next aspect to be considered is what is the effect of the Will being upheld under this proceeding. For my part, I am unable to agree with the contention of Mr. K. Gopalachari that because the widow is not a party to the proceedings, her rights would remain unaffected, since this contention ignores the fact that Venugopal (the first defendant) claims under the Will. The effect of the Will being upheld would mean to relate the possession of Arumbu to this Will since the Will dates back to the death of the testator, Sarangapani. In such an event, it is not open to her to set up a title other than the one under the Will. Mr. M.S. Venkatarama Iyer is, therefore, right in referring to and relying on the passage occurring in Chitaley and Rao, Limitation Act, 1963 4th 1965 Edition—Volume II) at pages 1261-1262.

> "It is also a fundamental principle that where possession can be referred to a lawful title, it will not be considered to be adverse. The reason is that a person whose possession can be referred to a lawful title will not be permitted to show that his possession was hostile to another title. The leading case on the point is *Thomas* v. *Thomas*[1], decided by the Court of Chancery in the year 1855. In that case *X* was entitled under the marriage settlement of his father and mother to certain real estates upon the death of his mother, to whom a life estate had been given therein. The mother died in 1832. *X* attained majority in 1836. The father remained in possession of the settled estate till his death in 1852. The question was whether the father's possession was adverse to *X* or whether it must be deemed to have been as guardian of *X*. Wood, V.C., observed as follows:
>
> 'But there is another principle which affects this case, namely that possession is never considered adverse if it can be referred to a lawful title. An important authority on this point is *Doe d Milner* v. *Brightwen*[2], where a party who had taken possession of copyholds on the death of his wife, by an adverse title, lived more than twenty years afterwards and it was then found that there was an old custom of the manor by which he had a right to curtsey, and therefore his possession was referred to that title which was consistent with the title of the other party.
>
> In this case a father, who had several children entitled to estates on the death of his wife, all the children being under age at that time, entered upon the estates........I think I must reasonably infer that the entry was an entry on their behalf and as their guardian and was totally different from the case of a mere stranger entering upon the property under similar circumstances. Then it is said that though the entry

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1. (1974) 2 M.L.J. 275; 87 L.W. 583; A.I.R. 1975 Mad. 8.

1. (1855) 110 R.R. 107 (110) : 25 L.J.Ch. 159.
2. (1809) 10 East 583 (594) : 103 E.R. 897.

might have been lawful in its inception the retention of the property after the children attained twenty-one barred their rights under the statute of limitation; but I think the better and sounder view here is that, if this gentleman entered as guardian this Court would never allow him to set up any other title to the estate."

This is what Grose, J., held in *Doe* v. *Brightwen*[1] :

"On the part of the defendant, who claimed under the present Lord Harewood, it was contended, 1st, that there had been an adverse possession from the death of Mrs. Lascelles in 1764, upwards of 40 years. To this it was answered, that by the custom of the manor the husband was entitled to hold the copyhold tenements of his wife, after her death, for his life, in the nature of tenant by the curtesy; and that Lord Harewood having survived his wife, and lived till 1795, there was no possession adverse to the title of the lessor of the plaintiff till after that time; inasmuch as the heir at law of Mrs. Lascelles could not recover the possession of the premises while her husband's estate by the curtesy existed........ In the present case Mrs. Lascelles's title was as heir to the three coparceners; her title was compelete without admission, to all purposes, except as against the lord, with respect to his right to his fine; and therefore we think that the entries given in evidence were sufficient to support the custom of tenancy by the curtesy, without the qualification of admittance of the wife, inasmuch as her title was such as not to require admittance to perfect it."

26. Lastly, the applicability of sections 10 and 11 of the Transfer of Property Act may be referred to. I am affraid, on this aspect of the matter, the Courts below have mis-directed themselves. Section 10 relates to a transfer of property with a condition restraining alienation while section 11 speaks of restriction repugnant to an absolute interest. In this case neither the Will, Exhibit A-1, nor the compromise, Exhibit A-4 confer, an absolute estate. Even that apart there is no scope for applying these sections to a compromise, since a compromise is not a transfer.

27. For all the above reasons, I come to the conclusion that the findings of both the Courts below are incorrect and I, therefore, set aside the same. The Second Appeal will stand allowed with costs. There will be a decree in favour of the plaintiffs, as prayed for. However, I grant leave.

S.J. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:—*T. Ramaprasada Rao and S. Ratnavel Pandian, JJ.*

The South Indian Bank Ltd., by its General Manager, M.G.P. Nambiar .. *Appellant**

v.

M/s. V. Krishna Chettiar and Brother by its Partner V. K. Palaniappan and others .. *Respondents.*

(A) *Transfer of Property Act (IV of 1882), section 3—"Attached to the earth"—Machinery and other articles in factory—Whether movable property—Burden of proof.*

(B) *Interest at 11 per cent. with quarterly rents—Whether usurious.*

There is no decisive and final test or guidelines tc earmark property such as machinery etc., found in a building as immovable property or movable property. The English maxim "*quicquid plantatur solo, solo cedit*" does not apply to India. The question as to whether movable properties which are fixed to the earth are an annexation to the land often depends upon the mode of annexation and primarily on the intention of the parties and other relevant surrounding circumstances, in each particular case. It is often presumed that if an owner of machinery which could be

1. 103 E.R. KB.D. XXXII-p. 897 at p. 901.

* A. No. 744 of 1970 and C.M.P. No. 14045 of 1974. 18th December, 1974.

annexed to the earth, so annexes it, with his own immovable property in connection with his trade or business, then it is said to assume the character of immovable property. Equally, a *prima facie* presumption, but not a sure one, is raised in the case of a tenant or a person not owning the immovable property but causing such annexation of movable property such as machinery etc., to be made to the premises as such, which is to the effect that such annexed property is movable property, because the tenant or a person having only a leasehold interest in the immovable property is often free to remove his movable property, such as machinery, etc. But, in the ultimate analysis, if the intention of either the owner or the tenant in making such annexation of movable property to immovable property is to permanently fix it along with the earth or the said immovable property, then it becomes part and parcel of it. The onus is on the person, who alleges that the particular article was always intended to retain the character of movable property. Such intention on the part of either the owner or the tenant, to treat such machinery fixed to the earth as moveable property can sometimes be inferred by their voluntary treatment of such property as belonging to one or the other species of property and by their conduct. [*Para.* 13.]

Attachment should be for the permanent beneficial enjoyment of that to which it is attached. [*Para.* 15.]

To find whether a particular rate of interest stipulated with a Bank is usurious, excessive, or unreasonable, the aggrieved party should at least let in evidence to show that such was not the rate of interest which the other Banks charged under similar circumstances. Each case has to be decided on its own merits. No hard and fast rule can be invoked merely on the mathematics of the rate per cent. to hold that the rate of interest was excessive. [*Para.* 26.]

Held on facts, that interest at the rate of 11 per cent. per annum with quarterly rests, even though it is secured by the property of the borrower, cannot be said in the circumstances of the case to be an excessive, exorbitant and unresonable. [*Para.* 27.]

Cases referred to :—

Jan Chand v. *Kishne*, A.I.R. 1960 Cal. 331; *Satyanarayanamurthy* v. *Gangayya*, (1939) 1 M.L.J. 692 : 49 L.W. 578 : A.I.R. 1939 Mad. 684.

Appeal No. 744 *of* 1970.

Appeal against the decree of the Court of the Subordinate Judge (Principal) of Salem dated 22nd January, 1969 and passed in Original Suit No. 85 of 1969.

C.M.P. No. 14045 *of* 1974.

Petition praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to add to the principal amount in the decree of the lower Court, the following amounts paid by the petitioner, Bank for renewal of the insurance for buildings and machineries mortgaged by the respondents to the petitioner namely:—

1. Rs. 1,742-85nP. paid on 21st September, 1973 for renewal of fire-insurance on the suit buildings and machineries;

2. Rs. 726-85nP. paid on 26th August, 1974 for renewal of fire insurance on the suit buildings; and

3. Rs. 1,016 paid on 26th September, 1974, totalling to Rs. 3,485-70 nP. together with future interest in the said Appeal No. 744 of 1970, on the file of the High Court.

C. Kurian, N.E. Arumugham and *N. Kanakaraju*, for Appellant.

M.S. Venkatarama Iyer, V. Krishnan and *Sankaran*, for Respondents.

The Judgment of the Court was delivered by

Ramaprasada Rao, J.—The plaintiff in O.S. No. 85 of 1966 on the file of the Subordinate Judge, Salem, is the appellant. Defendants 2 to 8, as partners of a registered partnership firm, known as V. Krishna Chettiar and Brother had on

application obtained financial aid from the plaintiff-Bank under four different heads, such as Key Loan Advances, Cash Credit Open Loans, Bills Purchases Account, and Cheques Discounting Account. From time to time, under one or other of the Heads of Advances, moneys were lent by the plaintiff-Bank to the partnership firm. The partnership was running an oil mill and a Ginning Factory. The premises in which the machinery of the mill and the factory was situate belonged to some of the partners of the firm. But, in connection with the advances made by the Bank to the partnership firm in connection with the partnership business, two kinds of securities were offered by the partners. The first one was under Exhibit A-24, dated 15th May, 1964, wherein some of the partners of the firm, who are the owners of the premises, which contained the machinery deposited the title deeds of the premises at Coimbatore, with the intention of creating an equitable mortgage thereon. The other security which they offered was under Exhibit A-29, dated 20th May, 1964, which was in connection with an express loan granted by the Bank to the tune of Rs. 80,000 on a hypothecation of the machineries and movables contained in the mill premises, but delineated in a particular schedule attached to Exhibit A-29, which was the deed of hypothecation.

2. The case of the plaintiff is that the defendants were operating on the various accounts under which financial aid was given by the Bank to the partnership firm. Originally, the rate of interest at which the amount so advanced by the Bank was repayable by the defendants, was agreed to at 9 per cent. per annum with quarterly rests. Later, admittedly, under Exhibit A-33, having regard to the increased demand in the rate of interest by the Reserve Bank of India, the rate of interest was increased from 9 per cent. to 11 per cent. per annum. The plaintiff has come to Court for the realisation of the amount due and payable by the defendants under the various heads of account and under which advances were made by the Bank to the defendants' partnership firm. The suit was laid for the recovery of a sum of Rs. 1,52,941-50 made up of a sum of Rs. 83,941-77 on the Cash Credit Open Loan and a sum of Rs. 66,725-20 under the Fully Secured Account and a sum of Rs. 95-87 under the Cash Credit Account. The plaintiff claims that it would be entitled to a concurrent remedy against defendants personally for the recovery of the suit debt and also sought for a charge decree against the immovable property, which is the mill premises which was equitably mortgaged with it, under Exhibit A-24 and also sought a charge on the machineries enumerated in the deed of hypothecation, Exhibit A-29, dated 20th May, 1964.

3. The 9th defendant was added on as a party-defendant, as it appears that he is a subsequent mortgagee over the immovable properties.

4. In so far as the defence is concerned the defendants do not dispute the accounts and the principal amount due. *Inter alia*, the main contention raised by the defendants was that the plaintiff, by virtue of the deed of hypothecation, Exhibit A-29, is not entitled to claim a charge on the machineries and movable properties in the mill premises, as according to the defendants, the said machineries have got imbedded themselves with the premises, which contained them and, therefore, such movable properties or machinery enumerated in the deed of hypothecation should be deemed to be annexed to the immovable property and in the absence of a regular instrument of mortgage, as contemplated under the Transfer of Property Act, and registered under the Registration Act, the deed of hypothecation, by itself, cannot create a right in the plaintiff to seek for a charge-decree as against the movables which are the subjectmatter of the deed of hypothecation.

5. The second contention is that the rate of 11 per cent per annum with quarterly rests is an arbitrary and usurious rate of interest and on that ground, the claim of the plaintiff was resisted. No doubt, they also contended that there was no proper equitable mortgage acceptable in the eye of law over the 'A' Schedule properties, which are the mill premises, as

according to them, there was no proper deposit of title deeds with the intention of creating an equitable mortgage over them, in a manner ordinarily understood in law. These are, in the main, the defences to the action.

6. On these relevant pleadings, the following issues were framed:—

1. Is the alleged mortgage over the plaint 'A' schedule properties by deposit of title deeds true, valid and binding on on any or all of the defendants ?

2. Is the alleged charge over the plaint 'B' schedule properties true, valid and binding on the defendants?

3. Is there any charge over items 25 to 28 of plaint 'B' schedule properties?

4. What is the amount for which the charge if any, is available over one or more of plaint 'B' schedule properties?

5. Is the plaintiff entitled to club together plaint 'A' and 'B' schedule properties for the entire suit amount?

6. Is the plaintiff entitled to claim interest at 11 per cent. per annum and not at 9 per cent. per annum?

7. Are the alleged mortgages and charge unlawful and do they amount to a fraud on the statute as pleaded by the 9th defendant?

8. What is the amount, if any, due to the 9th defendant in respect of the mortgage deed dated 17th November, 1965?

9. What is the nature of the decree that the 9th defendant is entitled to?

10. To what relief is the plaintiff entitled?

7. Issue No. 3 having been deleted, the learned Judge found on Issue No. 1, that there was a valid mortgage by deposit of title deeds over the 'A' schedule properties at Coimbatore and that Coimbatore being an area notified under section 69 of the Transfer of Property Act, the equitable mortgage by the plaintiff is sustainable. There is no cross-appeal over this finding. On the issue whether the hypothecation deed, Exhibit A-29, could be acted upon, so as to vest in the plaintiff a right to claim a charge on it, on foot that it was a mortgage on movable property, the finding of the trial Court is that the deed of hypothecation could not be acted upon or enforced, as the hypotheca, in the peculiar circumstances of the case, ought to be understood as movable property annexed to immovable property and, in the absence of a registered instrument on the foot of which such a relief could be asked, the trial Court negatived the relief for a charge over the 'B' Schedule property for the recovery of the suit claim. On the other question whether the interest at 11 per cent. per annum with quarterly rests, was usurious, it found in favour of the defendants. In the result, the trial Court decreed the suit for a sum of Rs. 1,48,223-82 with subsequent interest from the date of suit upto the date fixed in the usual mortgage decree at 9 per cent. per annum with quarterly rests and at the rate of 6 per cent. per annum thereafter and proportionate costs personally as against defendants 1 to 8, and created a charge over the 'A' Schedule properties only. It also incidentally gave a direction that the 9th defendant would be entitled to a sum of Rs. 26,000 with interest from 1st March, 1968, from and out of the surplus sale proceeds, if any, when the 'A' Schedule properties are brought to sale. As already indicated, it negatived the plaintiff's request for a charge-decree over the 'B' Schedule properties, which are the machinery or movables hypothecated under Exhibit A-29.

8. It is as against this, the present appeal has been filed by the Bank.

9. There is no appeal as against this judgment and decree by the 9th defendant. Nor, is there a cross-appeal by the contesting defendants against the finding of the trial Court that there is a valid mortgage over the 'A' Schedule properties and that the usual mortgage decree ought to be passed for the amount due and payable by the defendant-partnership firm to the Bank.

10. The Bank's contention, however, is that the trial Court went wrong in

having found that the 'B' schedule properties cannot be proceeded against by the plaintiff on the foot that a charge has been created over it for the amount lent thereon under Exhibit A-29. The submission is that under the hypothecation deed, the plaintiff has secured a right to obtain a charge as against the hypothecated articles and such deed being an independent and separate one, the Court ought not to have denied the usual charge-decree as against the 'B' schedule properties as well

11. The second contention is that the trial Court, without any material, which is acceptable by Courts of law, barely relied upon the contentions of the defendants in holding that 11 per cent. per annum with quarterly rests, would be usurious. As a matter of fact, the defendants having agreed to pay the said rate of interest, since the Reserve Bank of India, in turn has raised the rate of interest which it could claim from its subsidiaries, the argument is that there is no arbitrariness or usury in the claim of the plaintiff-Bank when it demanded 11 per cent. interest with quarterly rests on the actual amount due under the various accounts of the defendant with the plaintiff-Bank.

12. Mr. M. S. Venkatarama Iyer, learned counsel for the contesting respondents, however, would urge that in the context of events, the hypothecation deed should be interpreted in the light of the equitable first mortgage, and so interpreted, it should be held that the parties understood that the movables which were the subject-matter of the hypothecation were also being mortgaged as if it got annexed to the mill premises to which they were attached, and so understood, it would amount to a mortgage of immovable property and such mortgage not being evidenced by a deed of mortgage, in accordance with law, and registered in accordance with the Registration Act, the relief for a charge decree, as against the movables as if it is a separate transaction is a misconceived one. On the next contention, it is stated that 11 per cent. interest with quarterly rests, would be usurious.

13. In so far as the first question is concerned, it is a vexed one. Movable property has not been defined in the Transfer of Property Act. If some light at all is thrown in the General Clauses Act, movable property is that which is not immovable property. There is no decisive and final test or guidelines to earmark property such as machinery etc., found in a building as immovable property or movable property. The English maxim "*quicquid plantatur solo solo cedit*" does not apply to India. Thus, the difficult question as to whether movable properties which are fixed to the earth are an annexation to the land often depends upon the mode of annexation and primarily on the intention of the parties and other relevant surrounding circumstances, in each particular case. It is often presumed that if an owner of machinery which could be annexed to the earth, so annexes it, with his own immovable property in connection with his trade or business, then it is said to assume the character of immovable property. Equally, a *prima facie* presumption, but not a sure one, is raised in the case of a tenant or a person not owning the immovable property but causing such annexation of movable property, such as machinery etc., to be made to the premises as such, which is to the effect that such annexed property is movable property, because the tenant or a person having only a leasehold interest in the immovable property is often free to remove his movable property, such as machinery, etc. But, in the ultimate analysis, if the intention of either the owner or the tenant in making such annexation of movable property to immovable property is to permanently fix it along with the earth or the said immovable property, then it becomes part and parcel of it. Cases may arise when an article or machinery may be very firmly fixed to the land, but, yet the surrounding circumstances may be such as to show that it was never intended to be a part of the land. Thus, it reduces itself to a question of fact and a matter of proof. The onus is on the person, who alleges that the particular article was always intended to retain the character of movable property. He has to establish it. It ultimately depends upon

the intention of the parties. Such intention on the part of either the owner or the tenant, to treat such machinery fixed to the earth as movable property can sometimes be inferred by their voluntary treatment of such property as belonging to one or the other species of property and by their conduct.

14. A true test is contained in the explanation given to the parenthesis "attached to the earth" appearing in section 3 of the Transfer of Property Act.

"Attached to the earth" means—

(*a*) rooted in the earth, as in the case of trees and shrubs;

(*b*) imbedded in the earth, as in the case of walls or buildings;

or

(*c*) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached".

15. From the above meaning given by the statute to the expression attached to the earth", it is clear that such attachment should be for the permanent beneficial enjoyment of that, to which it is attached..

16. Mulla in his book on Transfer of Property Act, 1966 (Sixth Edition) quoted with approval a decision of the Calcutta High Court in *Jan Chand* v. *Kishore*[1] and stated:

"In a recent Calcutta case, it has been held, it is submitted, correctly, that the test is whether the annexation is with the object of the permanent beneficial enjoyment of the land or building; so machinery for metal-shaping and electroplating which was attached by bolts to special concrete bases and could not be easily moved, was held not to be a part of the structure housing it or the soil beneath it. The Court held that the machinery was not attached for the more beneficial enjoyment of either the soil or the concrete; it was actually a case of the structure being built around the machinery to protect it."

1. A.I.R. 1960 Cal. 331.

17. We shall now refer to the evidence let in, in the instant case. The plaintiff examined P.W. 2, who was the Agent of the plaintiff-Bank at Salem Branch, at or about the time when the financial aid was granted by the Bank to the partnership firm. While giving out the nature of the machinery in the factory premises and as a person who had first hand knowledge of it, as he had inspected the mills and the machineries, the witness would have it that all the machineries were not permanently fixed to the earth. He went on to describe the important machineries housed in the factory such as the transformer, lathe, the welding transformer, and generator, etc., in cross examination and would say, that each of these and parts of machinery which were in the mills and the Ginning Factory were based on studs or platforms fixed on the earth and they were fitted by bolts and nuts. He was emphatic that almost all the parts inside the factory premises were all so fixed on studs which, in turn, of course, were imbedded to earth.

18. In fact, D.W. 2, examined on the side of the defendants, would not speak about the machineries being annexed to earth, or imbedded on earth, in chief examination, and even in cross-examination, his case is that all the machineries have been fixed on concrete platforms.

19. Thus, therefore, the principle in the Calcutta decision, cited above, squarely applies to the facts of this case. The machineries are attached by bolts to special concrete bases or studs, or platforms and no one interested in saying so, would say that they are so attached to earth, so as to make it appear that such articles have been so imbedded for the permanent beneficial enjoyment of the mill premises itself. We accept the evidence of P.W. 2, in the absence of any contrary materials before us, to say that the imbedding is as urged by Mr. Venkatarama Iyer.

20. One other aspect, which also prompts us to hold that the parties intended to treat the machinery and other articles in the factory premises as movable property and not property attached to earth or imbedded to earth,

within the meaning of the provisions of the Transfer of Property Act, is that when they secured financial aid from the Bank, they executed an independent hypothecation deed, wherein they say that they have hypothecated in favour of the Bank, machineries and other movables described in general terms in the schedule to that deed. They have described the hypotheca as "hypothecated goods". They have explained the meaning of the expression as meaning all the machineries and other movables of any kind now fixed to the earth, installed in, or kept in, or that will be hereafter fixed from time to time, or which shall be brought in and installed, or mounted or kept in use at the borrowers' premises or workshop. The schedule to this deed gives the description of the machineries. There are 24 items in it and almost all these items have been referred to by P.W. 2 in his evidence. We have already referred to his testimony. He would say that all such items are either fixed to a platform or affixed to a stud over the earth by bolts and nuts. The parties, therefore, intended, at all material times, and at the crucial time when they borrowed money under Exhibit A-29 that the machineries which they had and the machineries to be brought in, on which they obtained financial aid from the Bank, have to be treated as movable property. If their evidence was that this property should also be treated as annexed to their mill premises, nothing prevented them from including these movables as an additional schedule under Exhibit A-24, whereunder they deposited their title deeds to their properties with the intention of creating an equitable mortgage.

21. From the conduct of the borrowers and from the intrinsic value of the recitals in Exhibit A-24, which is the hypothecation deed, we are unable to resist the reasonable conclusion which flow from the surrounding circumstances and the facts of this case, that the parties intended that the machineries delineated in Exhibit A-29 were to be understood and meant as movable property rather than as immovable property in the sense that they become imbedded to earth so permanently as without it, the mill premises cannot be beneficially enjoyed.

22. One other circumstance, which also reflects such an intention of the parties is that whilst the deposit of title deeds was made on 15th May, 1964 under Exhibit A-24, the deed of hypothecation deed over the movables was made 5 days later, under Exhibit A-29. This conduct of the borrowers is also a pointer to the fact that the intention was to keep the mortgage over immovable property distinct, separate and different from the hypothecation over movables. This treatment of the machineries as independent goods, different from the premises which contained them makes the intention of the parties clear. That in such matters, it is the intention of the parties, which often looms large, is clear from the decision of a Division Bench of our Court in *Satyanarayanamurthy* v. *Gangayya*[1], Varadachariar, J., speaking for the Bench, found as a fact, that the machinery which formed part of the building was dealt with independently in an independent schedule and even then, the learned Judge was satisfied that the movables which formed part of a separate schedule cannot be treated as immovable property and dealt with, as such. The learned Judge went on to say "It also appears to us that on the construction of mortgage deeds the machinery specified in schedule 'C' was mortgaged not as part of or passing with the immovable property, but independently as immovable property". We are, therefore in the instant case unable to agree with the contention of the learned counsel for the respondents that the machinery in the instant case should be considered as movable, which got imbedded to earth so as to metamorphose itself into in movable property and be treated as such, for purposes of this discussion.

23. The trial Court, therefore, was wrong in having applied certain principles in certain well settled decisions of this Court and other Courts, which obviously depended upon the facts and circumstances in those relevant decisions. But, as it appears to us, and on the facts and circumstances of this case, and having regard to the conduct and intention of the parties, which is explicit, we find

1. (1939) 1 M.L.J. 692: 49 L.W. 578: A.I.R. 1939 Mad. 684.

that the hypothecation related to movable property and that the plaintiff, therefore, in terms of Exhibit A-29, is entitled to claim a charge-decree over the properties described in the 'P' Schedule to the plaint, which are the movables enumerated in Exhibit A-29. To this extent, the judgment of the trial Court is reversed.

24. The other contention of the learned counsel for the appellant is that the plaintiff is entitled to interest at 11 per cent. per annum with quarterly rests. The learned Judge referred to various decisions, which touched upon usury and unreasonable rate of interest and suddenly concluded that the 11 per cent. interest with quarterly rests is excessive, having regard to the security offered by the borrowers. No doubt under Exhibit A-21, the interest originally agreed to on the advances to be made by the Bank was only 9 per cent. per annum with quarterly rests. But, under Exhibit A-33 the contesting defendants were informed that the Reserve Bank of India has increased the Bank Rate from 5 to 6 per cent. and placed restrictions on borrowings by scheduled Banks from it. It is also claimed that the Reserve Bank advised that the rates of interest on Savings Bank and time Deposit should be stepped up in order to enable the Banking System to attract more deposits. In those circumstances, the plaintiff-Bank, in turn said, that it was constrained to increase the rate of interest on its advances from 9 per cent. to 11 per cent. on overdraft, open loan, and key loan facilities. That was to take effect from the 18th of February, 1965.

25. On receipt of this communication, one partner of the first defendant firm, who is a defendant in the action, agreed to the enhancement in the rate of interest, as stated in Exhibit A-33. There was, therefore, a contract openly entered into between the borrowers on the one hand and the Bank on the other, whereunder due to certain known circumstances, the rate of interest was increased from 9 per cent. to 11 per cent. per annum with quarterly rest.

26. To find whether a particular rate of interest is usurious, excessive or unreasonable, the aggrieved party should at least let in evidence to show that such was not the rate of interest which the other Banks charged under similar circumstances. There should also be telling evidence before the Court to establish that on a *prima facie* examination of the facts of a particular case it would ordinarily prompt the Court of law to opine that the rate of interest is exorbitant or excessive. Each case has to be decided on its own merits. No hard and fast rule can be invoked merely on the mathematics of the rate per cent to hold that the rate of interest was excessive. In the instant case, the parties were appraised of the increase in the rate of interest, not because the Bank wanted to make unreasonable gain and make the borrowers suffer unreasonable loss, but the increase itself was attributed to the increased demand of rate of interest by the Reserve Bank of India. This was, therefore, a circumstance, which was of universal application, in the sense that it applied to all banks and borrowers in similar circumstances. Therefore, it cannot be said that the increase from 9 per cent. to 11 per cent., having regard to the circumstances and time, at which the rate was increased, was an unreasonable or excessive rate.

27. The next question is whether the interest payable with quarterly rests would automatically be assumed or presumed to be an excessive payment made by the Bank. Here again, Mr. M. S. Venkatarama Iyer did not refer to us any circumstances, or the testimony of the partner, to say that the plaintiff-Bank has chosen to adopt the method of recovery of interest with quarterly rests unusually and quite differently from the other banking institutions in the State. It is not even brought out to us that the resultant of the interest calculated on the basis of 11 per cent. per annum with quarterly rests, would be unconsciousably high, or would be unreasonably excessive. It is only in those circumstances when the Court's conscience is shaken on a *prima facie* understanding of the facts, that such demand for interest, in the circumstances of a particular case would place the defendant in a pitiable situation that the Courts will interfere with the contract rate openly agreed to by parties. No such evidence has been let in and no such materials have been

placed before us for consideration to decide whether the 11 per cent. interest with quarterly rests, would result in a great prejudice to the borrowers in the instant case. In this respect also, the Trail Court went wrong in referring mechanically to certain decisions of our Court wherein the rate per cent. was held to be usurious. Having regard to the time at which the increase in the rate of interest was made and as the borrowers themselves did not raise any protest to it, at any time, until they were called upon to repay the principles with interest at that rate, we feel that the objection is merely an afterthought. Even otherwise, the materials before us do not compel us to hold that the 11 per cent. interest per annum with quarterly rests, even though it is secured by the property of the borrowers, can be said to be an excessive, exorbitant and an unreasonable rate of interest.

28. The trial Court's decision on this aspect is also reversed.

29. The above contract rate of interest will be applied until the date of suit. Thereafter the contesting defendants are liable to pay interest at the rate of 11 per cent. per annum without being further charged with additional interest at quarterly rests.

30. The result is that there will be a decree, as prayed for, and together with interest thereon at 11 per cent. with quarterly rests, upto the date of plaint and thereafter at the rate of 11 per cent. from the date of suit till the date of payment and the usual mortgage-decree will be passed including Schedules A and B, as the hypotheca or the security from which the plaintiff could realise the decree amount. The appeal is allowed with costs.

C.M.P. No. 14045 *of* 1974.

31. The plaintiff has filed a petition to include a sum of Rs. 3,485.70 to the principal amount claimed on the foot that it has paid the insurance premia in connection with the fire insurance on the suit building and machineries. The plaintiff is entitled to it and this amount will be added to the principal, provided the plaintiff pays the court fee on this account,

32. He would be entitled to interest thereon at 6 per cent. from the date of payment.

33. The appeal and the civil miscellaneous petition are allowed. There will be no order as to costs.

R.S. —— *Appeal and Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*S. Mohan, J.*

Krishnaswami Goundar .. *Appellant**

v.

A-2190 Jambuthurai Kottai Co-operative Society by its President and others .. *Respondents.*

Civil Procedure Code (V of 1908), *Order* 2, *rule* 90—*Madras Co-operative Societies Act (LIII of* 1961), *section* 100 *and rule* 69—*Sale following award decree by Deputy Registrar of Co-operative Societies—Suit properties subsequently attached and brought to sale by civil Court—Suit by purchaser in civil Court-sale for possession—Bar of suit—Exclusion of jurisdiction of civil Court.*

The plaintiff had purchased the suit property in a Court-auction and the sale was confirmed on 30th April, 1970. When the plaintiff sought to take delivery of possession he was obstructed by the first defendant, a co-operative society which had obtained an award decree before the Deputy Registrar of Co-operative Societies and in execution thereof had purchased the property on 24th November, 1969. The plaintiff filed a suit for possession and the suit was decreed. On appeal, the lower Court reversed the decree. On second appeal by the plaintiff,

Held, The prior sale in favour of the Co-operative Society has to prevail. Had the civil Court been informed of the earlier sale there would not have been an occasion for the Court-sale at all. On merits, there was no difficulty in concluding that

* Appeal No. 1187 of 1973, 18*th July*, 1974.

the first sale has to prevail, irrespective of the fact whether the civil Court had jurisdiction or not. [*Para.* 7.]

Relying on section 100 of the Co-operative Societies Act read with rule 69 (7), apart from there being a finality, there is an ouster of the jurisdiction of the civil Court. [*Para.* 8.]

Cases referred to :—

Sree Raja Kandregula Srinivasa Jagannadharao Panthulu Bahadur Garu v. *State of Andhra Pradesh*, (1970) 2 S.C.R. 714 : (1971) 1 S.C.J. 192 : (1971) 1 M.L.J. (S.C.) 26 : (1971) 1 An.W.R. (S.C.) 26: A.I R. 1971 S.C. 71; *Kovvidi Satyanarayana* v. *Motu Industries P. Ltd.*, (1963) 1 An.W.R 323 ; *Boggavarapu Venkata Subbiah* v. *Chenchupolli Penah*, (1951) 2 M.L.J. 269 : 64 L.W. 762: A.I.R. 1952 Mad. 266; *Ramabakthalu Ramayya* v. *Chittoor District Co-operative Deputy Registrar*, I.L R. (1946) Mad 330 : 58 L W. 341 : (1945) 2 M.L.J. 12: A.I.R. 1945 Mad. 370.

Appeal against the decree of the sub-Court, Madurai in A. S. No. 332 of 1972, preferred against the decree of the District Munsif Court, Madurai Taluk in O. S. No. 579 of 1971.

V. Venkataraman and *S. Balasubramaniam*, for Appellant.

N. S. Srinivasan, for 1st Respondent.

The Court delivered the following

JUDGMENT.—O.S. No. 579 of 1971 was preferred before the file of District Munsif, Madurai, for declaration and mandatory injunction and the plaintiff's allegations are briefly as follows :

2. The suit properties originally belonged to F. Malaya Gounder, the 3rd defendant. The second defendant had obtained a decree against the 3rd defendant in O.S. No. 359 of 1968 on the file of the District Munsif Court, Madurai. The suit properties were attached in execution of his decree in E.P.No.85 of 1969 on 8th March, 1969 and were brought to sale on 23rd February, 1970. The plaintiff purchased them for Rs. 1,300 subject to the encumbrance and the sale was confirmed on 30th April, 1970. E.A. No. 564 of 1970 was filed for delivery of the properties and the same was effected on 6th June, 1970 and the delivery was also recorded as on 8th June, 1970. That ever since the date he had been in possession and enjoyment of the properties is seen from the patta and cist receipts. While that being so, the first defendant obtained an award decree in A.R.C.No.141 of 1968 before the Deputy Registrar of Co-operative Societies and in execution of that award he came to purchase the property on 24th November, 1969 itself. When the plaintiff wanted to take delivery of the possession he was obstructed by the first defendant and his men and hence the suit.

3. The first defendant filed a written statement stating as follows. The property has been purchased by this society on 24th November, 1969 itself in execution of the award decree obtained against the 3rd defendant, and that therefore any subsequent sale in favour of the plaintiff, be it a Court sale, will not divest the title of the first defendant and as between the competing titles, the title of the society ought to be preferred it being earlier in point of time. It is a valid sale, by which the property had already been sold and therefore the plaintiff derived no title. The learned District Munsif of Madurai who tried the suit decreed in favour of the plaintiff holding that the Court sale ought to be preferred to that for the sale in execution of the award obtained under the Co-operative Societies Act. He also held that the bar under section 100 of the Co-operative Societies Act, 1961, could not oust jurisdiction of the civil Court.

4. On appeal, in A.S. No. 332 of 1972, the learned Subordinate Judge of Madurai reversed the finding and set aside the decree. Against, this, the present second appeal has come to be preferred.

5. Mr. Balasubramaniam, learned counsel for the appellant, contends that the finding of the lower appellate Court about the bar of jurisdiction under section 100 is incorrect in view of the later judgments of the Supreme Court and one such is in *Sree Raja Kandregula Srinivasa Jagannadharao Panthulu Bahadur Garu (decd.)* v. *State of Andhra Pradesh*[1] where their Lordships of

1. (1970) 2 S.C.R. 714 : (1971) 1 S.C.J. 192 : (1971) 1 M.L.J. (S.C.) 26 : (1971) 1 An.W.R. (S.C.) 26 : A.I.R. 1971 S.C. 71.

the Supreme Court set out the grounds on which the jurisdiction of the civil Court should be excluded. The first ground mentioned is :

> " 1. Where the statute gives a finality to the orders of the special Tribunal the civil Court's jurisdiction must be held to be excluded if there is adequate remedy to do what the civil Courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory Tribunal has not acted in conformity with the fundamental principles of judicial procedure."

Relying on the above principles, it is contended that the provisions of the Act have not been complied with, and therefore, the bar under section 100 of the Co-operative Societies Act cannot be invoked as against the appellant. It is further submitted by the learned counsel that his sale ought to be preferred since the sale by the Society, in favour of itself, is vitiated by fraud and illegality. Lastly, it is submitted that from the date of purchase, the plaintiff was alone in possession and enjoyment as seen from Exhibits A-15 to A-18 the pattas issued in his favour and Exhibit A-19 to A-22 the kist receipts.

6. *Per contra*, Mr. N. S. Srinivasan submits that his sale is prior in point of time namely, 24th November, 1969 while that of the plaintiff is later. There is absolutely no evidence to show that the sale is in any way vitiated by fraud or illegality. The bar under section 100 read with rule 69 (7) could be validly invoked in this case.

7. On a careful consideration of the above submissions, I come to the following conclusion : The sale in favour of the Co-operative Society is dated 24th November, 1969 while the sale under which the plaintiff got title is, dated 30th April, 1970. Undoubtedly therefore, the prior sale in favour of the Co-operative Society has to prevail. If the civil Court had been informed of the earlier sale there would not have been an occasion for the Court-sale at all, because, in view of the previous sale in favour of the Co-operative Society, the judgment-debtor, namely 3rd defendant had lost all his rights, title and interest in the suit property, and therefore, the Court sale could not convey any right in favour of the plaintiff. So, on merits, there is no difficulty in concluding that the first sale has to prevail, irrespective of the fact whether the civil Court has jurisdiction or not.

8. Inasmuch as the point relating to the jurisdiction has been elaborately argued I also think it necessary to deal with the same. The reliance placed in *Sree Raja Kandregula Srinivasa Jagannadharao Pantulu Bahadur Garu* v. *State of Andhra Pradesh*[1] by the learned counsel for the appellant is misconceived. This is not a case in which there is any non-compliance with provisions of rule nor again is this the case where the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure. In fact, the first half of the provision extracted above will clearly govern this case. It is stated there :

> " Where the statute gives a finality to the orders of the special Tribunal the civil Court's jurisdiction must be held to be excluded if there is adequate remedy to do what the civil Courts would normally do in a suit......."

In this connection, I find the reliance placed on section 100 read with rule 69 (7) by the learned counsel for the respondent is well-founded. Section 100 states as follows :

> " No order of award passed, decision or action taken or direction issued under this Act by an arbitrator, a liquidator, the Registrar or an officer authorised or empowered by him, the Tribunal or the Government or any officer subordinate to them, shall be liable to be called in question in any Court."

Rule 69 (7) is to the following effect :

> " All orders made under the rule shall subject only to the provisions of section 97 be final and shall not be liable to be questioned in any suit or other legal proceeding."

1. (1970) 2 S.C.R. 714 : (1971) 1 S.C.J. 192 : (1971) 1 M.L.J. (S.C.) 26 : (1971) 1 An.W.R (S.C.) 26 ; A.I.R. 1971 S.C. 71.

Apart from there being a finality, there is an ouster of the jurisdiction of the civil Court. In a case reported in *Kovvidi Satyanrarayana* v. *Motu Industries (P.) Ltd.*[1] the provisions of the previous Act came up for interpretation. Section 48 of the old Act corresponded to the present section 100 while rule 22 was similar to rule 69. In such a case, after referring to various decisions regarding exclusion of the jurisdiction of the civil Court it was held as follows :

> " It is not open to the plaintiff to challenge the correctness of the award passed by the Deputy Registrar under section 51 of the Madras Co-operative Societies Act, or the sale held pursuant to the said award. The Act has, under section 57 empowered the Registrar and the State Government to correct the decisions embodied in awards under section 51. Section 51 (6) expressly bars the jurisdiction of civil and revenue Courts to call in question the decision under section 51. Likewise, rule 22 of the rules made under the Act provides the procedure to be followed in execution of an award passed under section 51, and also for setting aside the sale on the ground of material irregularity or fraud. The jurisdiction of the civil Courts to set aside the sale is also barred. Therefore, the suit for declaration that the sale is void and not binding on the plaintiff and other creditors is barred by the provisions of the Co-operative Societies Act."

It may be noted that the learned Judge who decided the case relied on the decision of this Court in *Baggavarapu Venkatu Subbiah* v. *Chenchupalli Periah*[2], wherein Panchapagesa Sastri, J., following the earlier decision in *Ramabakthalu Ramayya* v. *Chittoor District Co-operative Deputy Registrar*[3], held:—

> " that a sale in execution of awards of Co-operative Societies cannot be attacked by a suit in a civil Court either on the ground of fraud or irregularity in the conduct of the sale or even illegality, and the civil Court has no jurisdiction to go into such matters."

1. (1963) 1 An.W.R. 323.
2. (1951) 2 M.L.J. 269 : 64 L.W. 762 : A.I.R. 1952 Mad. 266.
3. I.L.R. (1946) Mad. 330 : 58 L.W. 341 : (1945) 2 M.L.J. 112 : A.I.R. 1945 Mad. 370.

I find the Court below has relied upon the last of the decisions, namely, *Romabakthula Ramayya* v. *Chittoor District Co-operative Registrar*[1], which is also on point. In this view I have no hesitation in holding that the jurisdiction of the civil Court is excluded in the present case. Assuming that the civil Court has jurisdiction I find that no evidence whatsoever has been let in on behalf of the plaintiff to prove that the sale in favour of the Co-operative Society was vitiated by fraud, illegality or irregularity. On this aspect of the matter I am in entire agreement with the finding of the lower appellate Court which states in Para. 8 of its judgment : " In the first place I may point out that there is absolutely no evidence worth the name on the side of the plaintiffs to show that the sale was vitiated by any fraud, illegality or irregularity."

9. Further, it is contended by the learned counsel for the appellant that the president of the first defendant Society and the third defendant are close relations, and therefore, it can easily be inferred that the sale was done in a clandestine way and fraudulent manner This is too tall a statement and I cannot accept the same. In the absence of evidence regarding fraud, illegality or irregularity it must be held that the sale in favour of the Co-operative Society is valid one.

10. For the above reasons I hold that the second appeal is liable to be dismissed. Accordingly, the same is dismissed. There will be no order as to costs. No leave.

S.J. *Appeal dismissed.*

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1. I.L.R. (1946) Mad. 330 : 58 L.W. 341:)1945) 2 M.L.J. 112: A.I.R. 1945 Mad. 370.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*M. M. Ismail, J.*

Combined Traders by its Managing Partner, T J. Cherian .. *Petitioners**

v.

State of Tamil Nadu represented by the Secretary to Government, Agricultural Department, Fort St. George, Madras-9 and others .. *Respondents.*

Constitution of India (1950), *Articles* 19 (1) (f), 301—*Government property—Auction for sale of bluegum—Condition imposed by Government—Whether violative of Articles* 301 *and* 19 (1) (f).

Neither Article 301, nor Article 19(1)(*f*) of the Constitution can have any application whatever to the property of the Government. When the Government are the owners of a property they have a right to deal with the same in any manner as they like just like any other owner is competent to do. [*Para* 7.]

The Government can sell the property on any terms they like and a person like the petitioner has no fundamental right to purchase the Government property. When a condition is imposed by the Government, subject to which alone the property is sold, nobody can contend that Article 301 of the Constitution of India has been violated. [*Para.* 7.]

Cases referred to :—

C. K. Achuthan v. *The State of Kerala and others*, 1959 S.C.J. 465 : (1959) 1 An.W.R. (S.C.) 164 : (1959) 1 M.L.J. (S.C.) 164 : A.I.R. 1959 S.C. 490; *Railway Board, New Delhi and another* v *Niranjan Singh*, (1969) 2 S.C.J. 513 : (1969) 3 S.C.R 548 : A.I.R. 1969 S.C. 966 ; *Damodaraswami Naidu* v *President of District Board, Coimbatore and another*, 69 L.W. 993 : A I R. 1957 Mad. 149 ; *Perkins* v. *Luken Steel Co.*, (1940) 84 Law Edn. 1108 ; *State of Mysore* v. *H. Sanjeeviah*, (1967) 2 S.C.J. 313 : (1967) 2 S.C.R 361 : A.I.R. 1967 S.C. 1189 ; *District Collector of Hyderabad and others* v. *M/s. Ibrahim and Company*, (1970) 2 S.C.J. 609 : (1970) 2 M.L.J. (S.C.) 109 : (1970) 2 An.W.R. (S.C.) 109 : A.I.R. 1970 S.C. 1275 ; *Rashlihari Panda* v *State of Orissa*, (1969) 2 S.C.J 680 : A.I.R. 1969 S.C. 1081 ; *C V. Rajagopalachari* v. *State of Madras*, C.M.P. No. 6187 of 1951.

K. K. Venugopal, E. P. N. Nambiar, P. Chidambaram and *T. K. Rajeswaran*, for Petitioner.

V K. Thiruvenkatachari for *Subbaroya Iyer, Padmanabhan, Ramamani* and *S. V. Subramanyam, S. Ramalingam*, Assistant Government Pleader and *T. R. Ramachandran*, for Respondents.

The Court made the following

ORDER.—These four writ petitions deal with the same controversy and the facts as can be gathered from the various affidavits filed in these writ petitions are as follows :

2. The South India Viscose Limited, Coimbatore, hereinafter referred to as Viscose, is a company established in 1958. It has got its factory at Sirumugai near Mettupalayam, Avanashi Taluk, Coimbatore District. The factory is engaged in the manufacture of wood pulp, rayon yarn and staple fibre. The most essential raw material for high grade rayon pulp manufacture is bluegum timber grown in the Government reserve as well as private forests in the Nilgiris District. For the purpose of obtaining this raw material from the forests in the Nilgiris without any interruption to its work in the factory, the Viscose had approached the Government on several occasions. The Government entered into an agreement with the said Viscose on 5th April, 1965 for the supply of bluegum wood over 7,800 acres from 1966 to 1975 at Rs. 450 per acre per annum for the first three years and at revised rates for the subsequent years. The following are the details of the bluegum areas allotted to the said Viscose for working from 1966 to 1973 :

1966	..	300 acres
1967	..	406.45 acres
1968	..	589.85 acres
1969	..	800.00 acres

* W.P. Nos. 351 etc. of 1974.
26th *September*, 1974.

1970	..	788.32 acres
1971	..	900.00 acres
1972	..	1140.25 acres
1973	..	1000.00 acres

The rate of Rs. 450 was subsequently revised at Rs. 650 per acre from 1st January, 1959 to 31st March, 1973 and as Rs. 750 per acre from 1st April, 1973. Since the Viscose was not able to get all its requirements of raw materials from these areas allotted by the Government, it had approached the Government for allotment of all the Government forest lands to it for purposes of getting the necessary bluegum timber. In order to consider this request of the Viscose, a meeting was held on 9th May, 1966 at Ootacamund, attended by the Chief Minister of the State, the Minister for Co-operation, the Secretary of Government, Department of Agriculture, the Chief Conservator of Forests and a representative of the Viscose. As a result of the discussion, the Government arrived at certain conclusions, and those conclusions appear in the subsequent memorandum of the Government-Memorandum No. 48227/II/66-7 Agriculture Department, dated 7th June, 1966. The Government at that conference did not take a final decision on the request of the Viscose for allotment of all the reserved forests of the Government with bluegum plantation for its benefit and they had allotted the acreage as indicated above. This memorandum points out that during the discussion, it was brought to notice that the bulk of blugegum wood auctioned in the Nilgiris District was not reaching the civil population for use as firewood, that the coupes were taken in auction by various contractors and that the wood was then exported outside the State; and that in view of this, the Government had decided that the bluegum wood sold out in auction in the Nilgiris District should be used only as fuel, posts etc., for the benefit of the civil population in the Nilgiris District and should not be allowed to go out of the District. Subsequent to this the Government passed G.O. Ms. No. 3440, Agricultural Department, dated 26th October, 1966 which dealt with the supply of bluegum and wattle to Viscose and considered its representations. The Government decided to allow upto 1000 acres to Viscose and that was to be done from 1972 to 1975 and the rate per acre was also revised. This Government order also pointed out that as bluegum was more suitable than debarked wattle for rayon and paper industry, the Government decided that in future all the bluegum raised in the departmental plantations in the Nilgiris Division should be supplied to the pulpwood industries and that the debarked wattle wood might be made available to the public for use as firewood instead of bluegum. Notwithstanding this, the Government by the very same order also pointed out that the ban on the export of the bluegum raised by the Forest Department in the reserved forests in the Nilgiris District outside the district would continue, but the restriction imposed by the Government would not apply to bluegum felled by the Viscose exclusively for rayon pulp manufacture. Pursuant to the decision taken by the Government in their memorandum, dated 7th June, 1966 the following condition was imposed as condition No. 25 in the auction notice for the sale of bluegum in the Government reserved forests by public auction.

"25. Bluegum wood should not be transported outside the Nilgiris District"

Before I proceed further, it is necessary to refer to the quantity of bluegum area available for being sold in public auction. Paragraph 5 of the counter-affidavit filed by the Government in W.P. No. 351 of 1974 refers to a letter addressed by the Government to the Viscose wherein it is stated :

"Bluegum wood is the main source of fuel for the local population in the Nilgiris and Kodai hills. It is therefore considered essential to continue to offer bluegum plantation to the public for consumption as fuel through public auction. Further, the extent of bluegum areas disposed of by public auction is negligible when compared to the areas allotted to the Company"

In paragraph 14 of the same counter-affidavit, it is pointed out that after meeting this requirement, namely, allotment to the Viscose, the remaining area, *viz*, about 80 hectares alone is offered for public sale

to meet local requirements. In paragraph 16 of this affidavit, it is further pointed out that as firewood was available in excess of local requirements, as there was a large number of wind fallen trees due to a storm during 1973 and as Messrs. South India Viscose Limited were in need of more raw materials, the second respondent permitted the following six contractors to transport the bluegum wood to Messrs. South India Viscose Limited and that this permission, issued by the second respondent, was ratified by the Government in G.O. Ms. No. 310, Forests and Fisheries Department, dated 26th December, 1973.

(1) Nilgiris Traders.

(2) Combined Traders (Petitioners in all these writ petitions).

(3) Thiru V. V. Raman.

(4) Bhuvaneswari Depot.

(5) Thiru A. Subramaniam ; and

(6) Thiru M. Mathan.

Thus, it is clear that during 1973 only the contractors who were supplying the bluegum purchased by them at the auction conducted by the Government were permitted to remove the quantity of bluegum from the District which they were supplying to the Viscose. There is nothing on record to show that any such permission was granted in 1974.

3. There is yet another matter to which I must draw attention at this stage itself and that is, the price at which the bluegum wood was sold. The counter-affidavit filed on behalf of the Government points out that the price of bluegum fire wood varies from Rs. 75 to Rs. 80 per tonne according to the prevailing local market rates, that Messrs. South India Viscose Limited are buying bluegum wood at Rs. 98 per tonne at their depot at Mettupalayam, that the transport charges per tonne are Rs. 25 and that if that is deducted, it comes to Rs. 73 per tonne. However, in the affidavits filed in support of the writ petitions, it is stated in paragraph 5 thereof that the current purchase price of South India Viscose Limited, is Rs. 98-50 per tonne, while the price of Gwalior Rayons Ltd., offered at Mettupalayam depot is Rs. 92-75 per tonne and that if bluegum is sold as firewood, the rate will be Rs. 20 to Rs. 25 per tonne. But this controversy may not be relevant except to a limited extent to which I shall make reference later.

4. In W.P. No. 351 of 1974, the prayer is for the issue of a writ of *mandamus* to respondents 1 to 4, namely, the State of Tamil Nadu, the Chief Conservator of Forests, Madras Conservator of Forests, Coimbatore Circle and the District Forest Officer, Nilgiris South, Ootacamund, forbearing them from confirming the sale by auction of bluegum trees in 44 coupes held on 21st February, 1974 pursuant to the notice of the fourth respondent in Ref. No. 1587/74-L, dated 2nd February, 1974. In W.P. No. 352 of 1974, the prayer of the same petitioner is for the issue of a writ of *mandamus* forbearing respondents 1 to 4 from implimenting or giving effect to the restriction on the movement of bluegum wood from Government reserved forests outside the Nilgiris District, pursuant to the executive Orders contained in this behalf in the memorandum, dated 7th June, 1966, G.O. Ms. No. 3440 : Agriculture, dated 26th October, 1966 and condition No. 25 of the sale notice of the fourth respondent, to all of which I have already made a reference. W.P. No. 2086 of 1974 has been filed by the petitioner, after it has participated in the auction held on 21st June, 1974, bid for a particular coupe for Rs. 3,500. Even in this writ petition, the prayer is the same as that contained in W.P. No. 352 of 1971. W.P. No. 2400 of 1974 has been filed on 30th August, 1974, with reference to a notice of auction, dated 12th June, 1974 for conducting an auction on 16th August, 1974. Since no interim orders were issued, the auction was held on 16th August, 1974. The petitioner claims that it has bid at that auction also. The prayer in the writ petition also is the same is that in W.P. No. 2086 of 1974. Thus, the complaint of the petitioner, in all the writ petitions is that condition No. 25 incorporated in the auction notice, pursuant to the memorandum of the Government, dated 7th June, 1966 is illegal and therefore ought not to be given effect to. Therefore, the real question for consideration is, whether the said condition is illegal and therefore

respondents 1 to 4 should be prevented from giving effect to the same or not.

5. Mr. K. K. Venugopal, who, as usual addressed very elaborate arguments, put forward three contentions in support of these writ petitions. The first contention was that condition No 25 violated freedom of trade, commerce and intercourse guaranteed under Article 301 of the Constitution of India. The second contention was that by preventing the petitioner from bidding at the auction in competition with those who had entered into contracts with Viscose for supply of bluegum wood the fundamental right of the petitioner under Article 19 (1) (g) of the Constitution of India has been violated. The third contention was that inasmuch as the authorities had permitted the removal of the bluegum wood from the Nilgiris District for supply to Viscose and had not given any such permission to any other person, for instance, a person like the petitioner who would like to remove the bluegum wood outside the district for supply to a competitor, namely, Messrs. Gwalior Rayons Limited, who is prepared to pay a higher price and as a consequence the petitioner also would be prepared to offer a higher bid at the auction, the action of the authorities would constitute violation of Article 14 of the Constitution of India. I shall consider the validity of these submissions in the order in which I have mentioned them.

6. Article 301 of the Constitution of India states that subject to the other provisions of that Part, trade, commerce and intercourse throughout the territory of India shall be free. Only if Article 301 applies, the other Article will have relevancy. Consequently, the first question for consideration is, whether Article 301 can ever be invoked, having regard to the facts and circumstances of this case. I repeat the writ petitions are confined only to bluegum trees grown in the reserved forests of the Government and sold in public auction and they are not directed against allotment of specific acres of reserved forests with bluegum plantation for the benefit of the Viscose. With regard to the auction sale, admittedly the forests are the properties of the Government and consequently the bluegum plantations grown there are also the properties of the Government. The Government, with reference to their property, can choose any method whatever for disposal of the same. In this case they have chosen the method of public auction. With reference to such a public auction, they have imposed condition No. 25. Therefore, the question for consideration is, whether that will attract Article 301 of the Constitution of India at all. Mr. K. K. Venugopal frankly conceded that he was not able to lay his hands on any authority which directly deals with a case where Article 301 of the Constitution of India has been held to apply to a case where the property belongs absolutely to the Government. However, he relied on certain other decisions to which I shall make a reference in the course of this judgment.

7. In my opinion, neither Article 301, nor Article 19 (1) (f) can have any application whatever to the property of the Government. When the Government are the owners of a property, they have a right to deal with the same in any manner as they like just like any other owner is competent to do. The fact that the owners in this case happened to be Government does not make any difference and the Government do not suffer from any disability which any other owner does not suffer from . The auction notice is merely an invitation to others to make an offer for the purchase of the Government property. Since this invitation contains condition No. 25, any offer that can be made to the Government by any tenderer can be only on the basis of his acceptance of that condition. Certainly it is not open to such a person to say, " I am making an offer, but without the condition you have imposed ". Therefore, when any particular person makes an offer or tenders pursuant to such an invitation he does so, only on accepting the conditions imposed by the Government. As a matter of fact, no individual has got a a right to say that the Government's invitation should be without such a condition or in other words, the invitation of the Government should be on terms which an intending offeror would prefer or like to have. When the owner of a property is entitled to sell his property on any terms, he likes, certainly an intending

purchaser has no right to control that right of the owner to sell his property. It must be noticed at this stage itself that no statutory provision dealing with the sale of such Government property was brought to my notice so as to contend that condition No. 25 is in violation or contravention of such statutory provision. When the Government are the absolute owners of the property, just like any other owner they can sell the property on any terms they like, and a person like the petitioner has no fundamental right to purchase the Government property. The question of fundamental rights, if any, will arise only after the petitioner becomes the absolute owner of the property. When the petitioner itself purchases the property subject to the condition, namely, that the very right it secures is subject to the limitation, it is not open to it thereafter to contend that such a condition violates its fundamental right under Article 19 (1) (*g*) of the Constitution of India. As a matter of fact, the very tender notice contemplates the execution of an agreement by the highest bidder, whose bid has been confirmed, with the Government in respect of the sale as well as the work of the coupe which had been sold. It is admitted that condition No. 25 contained in the auction notice has been incorporated as condition No. 35 of the agreement. Thus, it is clear, that the very purchase of the property by the petitioner in W.P. No. 2086 of 1974 was subject to the condition that it had no right to remove the purchased goods from the Nilgiris. To that effect it had expressly agreed not only by making the offer and bidding at the auction, but also by subsequently entering into an agreement with the Government. Therfeore, in my opinion, the question of freedom of trade, commerce and intercourse cannot have any relevancy in dealing with the property of the Government which the Government have right to deal with in any manner they please. When such a condition is imposed by the Government, subject to which alone the property is sold, nobody can contend that Article 301 of the Constitution of India had been violated. Similarly, as I have pointed out already, no citizen has any right to claim that he has got a fundamental right to purchase the property of the Government. In this case, the very purchase itself is subject to condition No. 25 and therefore once a person purchases a property subject to such a condition, it is not open to him thereafter to contend that the condition, which was in existence even before the purchase and subject to which alone he purchased, interfered with his fundamental right either under Article 19 (1) (*f*) or 19 (1) (*g*) of the Constitution of India.

8. Now, let me refer to a few decisions cited at the Bar with regard to the first two points. As far as this Court is concerned, there is the earliest decision of a Bench of this Court concerning Government property. That is *C. V. Rajagopalachari* v. *The State of Madras represented by Secretary to Government Public Works Department, Madras*[1]. In that case, the petitioner claiming to be the Secretary of the Peoples' 'Civil Liberties Union, Madras prayed for the issue of a writ of *mandamus* directing the State of Madras represented by the Secretary to Government Public Works Department, to allow the petitioner to hold the annual conference of the Peoples' Civil Liberties Union on any two consecutive days in May, 1951 in the Rajaji Hall. A Bench of this Court (Rajamannar, C.J., and Venkatarama Ayyar, J.) held :

> "The Government would be at liberty to let property belonging to them to any one whom they choose............
> If the position is that Rajaji Hall is a property belonging to the Government, then there can be no question of any citizen as such having a right to demand the use of the hall from the Government. If he has no such right, it follows that Article 14 of the Constitution is in no way infringed. The petitioner referred us to Article 298 of the Constitution; but it does not help him in any way. He was unable to point out any law made by the appropriate Legislature, *i.e.*, the Legislature of this State concerning the grant or the disposition or mortgage of any property held by the Government for the purpose of the State. The petitioner's contention that the Government should not make a discrimination in letting any property by belonging to them is not supported by any authority or principle."

1. C. M. P. No. 6187 of 1951. dated 6th September, 1951.

9. The next decision is that of the Supreme Court in *C. K. Achuthan* v. *The State of Kerala and others*[1]. The petitioner therein held contracts for the supply of milk to the Government Hospital at Cannanore ever since 1946. In 1957 the petitioner and a co-operative milk supply union submitted their respective tenders for the supply of milk and after scrutiny the tender of the petitioner was accepted. Later on, however, the District Medical Officer cancelled the petitioner's contract for the supply of milk and gave it to the co-operative milk supply union. The petitioner filed a writ petition under Article 32 of the Constitution of India before the Supreme Court. The Supreme Court held :

> " The gist of the present matter is the breach, if any, of the contract said to have been given to the petitioner which has been cancelled either for good or for bad reasons. There is no discrimination, because it is perfectly open to the Government, even as it is to a private party, to choose a person to their liking, to fulfil contracts which they wish to be performed. When one person is chosen rather than another, the aggrieved party cannot claim the protection of Article 14 because the choice of the person to fulfil a particular contract must be left to the Government. Similarly, a contract which is held from Government stands on no different footing from a contract held from a private party. The breach of the contract, if any, may entitle the person aggrieved to sue for damages or in appropriate cases, even specific performance, but he cannot complain that there has been a deprivation of the right to practise any profession or to carry on any occupation, trade or business, such as is contemplated by Article 19 (1) (*g*). Nor has it been shown how Article 31 of the Constitution may be invoked to prevent cancellation of a contract in exercise of powers conferred by one of the terms of the contract itself."

10. The next decision of the Supreme Court is *Railway Board, New Delhi and another* v. *Niranjan Singh*[1]. There the Railway employees claimed a right to hold meetings and use the premises belonging to the Railway. They contended that the direction issued by the General Manager against holding of any such meeting violated Article 19 (1) (*a*), (*b*) and (*c*) of the Constitution of India. Dealing with that contention, the Supreme Court pointed out :

> " It was not disputed that the Northern Railway is the owner of the premises in question. The fact that the Indian Railways are State undertakings does not affect their right to enjoy their properties in the same manner as any private individual may do subject only to such restrictions as the law or the usage may place on them. Hence unless it is shown that either under law or because of some usage the railway servants have a right to hold their meetings in railway premises, we see no basis for objecting to the direction given by the General Manager. There is no fundamental right for any one to hold meetings in Government premises. If it is otherwise there is bound to be chaos in our offices. The fact that those who work in a public office can go there does not confer on them the right of holding a meeting at that office even if it be the most convenient place to do so.
>
> It is true that the freedoms guaranteed under our Constitution are very valuable freedoms and this Court would resist abridging the ambit of those freedoms except to the extent permitted by the Constitution. The fact that the citizens of this country have freedom of speech, freedom to assemble peaceably and freedom to form associations or unions does not mean that they can exercise those freedoms in whatever place they please. The exercise of those freedoms will come to an end as soon as the right of someone else to hold his property intervenes. Such a limitation is inherent in the exercise of those rights. The validity of that limitation is not to be judged by the tests prescribed by sub-Articles (2) and (3) of Article 19."

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1. 1959 S.C.J. 465 : (1959) An.W.R. (S.C.) 164 : (1959) 1 M.L.J. (S.C.) 164 : A.I.R. 1959 S.C. 490.

1. (1969) 2 S.C.J. 513 : (1969) 3 S.C.R. 548: A.I.R. 1969 S.C. 966.

11. There is yet another judgment of this Court dealing with tenders invited by the District Board, Coimbatore. That decision is *Damodaraswamy Naidu* v. *President of District Board, Coimbatore and another*[1] The point that was urged in that case was that the acceptance of tender of another person was in breach of rules 9 and 10 of the Rules for Tenders and Contracts framed by the Government under section 199 (2) (*n*) of the Madras District Boards Act, 1920. This Court held that the petitioner therein had no right to approach this Court invoking the jurisdiction of Article 226, because no right of the petitioner could be said to have been affected by the acceptance of the tender of another person. This Court elaborately considered the question and referred to the following observations of Street on Governmental Liability, 1953 Edn., at page 97 :

> " ....the provisions are for the benefit of the United States as a whole rather than of the bidder, and they are designed to prevent fraud."

Thereafter, this Court referred to the decision in *Perkins* v. *Lukens Steel Co.*[2], and extracted the following passages :

> " Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases. Acting through its agents as it must of necessity, the Government may for the purpose of keeping its own house in order lay down guide posts by which its agents are to proceed in the procurement of supplies, and which created duties to the Government alone.
>
> It has done so in the Public Contracts Act. That Act does not depart from but instead embodies the traditional principle of leaving purchases necessary to the operation of our Government to administration by the executive branch of Government with adequate range of discretion free from vexatious and dilatory restraints.......... It was not intended to be a bestowal of litigable rights upon those desirous of selling to the Government ; it is a self-imposed restraint for violation of which the Government but not private litigants can complain..........
>
> ...... prospective bidders for contracts derive no enforceable rights against the agent for an erroneous interpretation of the principal's authorisation. For erroneous construction of his instructions, given for the solid benefit of the principal, the agent is responsible to his principal alone because his misconstruction violates no duty he owes to any but his principal."
>
> The Secretary's responsibility is to superior executive and legislative authority. Respondents have no standing in Court to enforce that responsibility or to represent the public's interest in the Secretary's compliance with the Act. That respondents sought to vindicate such a public right or interest is made apparent both by their prayer that the determination be suspended as to the entire steel industry and by the extent of the injunction granted ....
>
> Our decision that the complaining companies lack standing to sue does not rest upon a mere formality. We rest it upon reasons deeply rooted in the constitutional divisions of authority in our system of Government and the impropriety of judicial interpretations of law at the instance of those who show no more than a mere possible injury to the public."

12. The above decisions make it clear that the Government can own property, deal with it and dispose it of in any manner it pleases, just like any other private citizen and equally it can enter into contracts with others for obtaining its requirements and necessaries and for disposing of its property and possessions. In the exercise of such rights, the Government does not stand in a position different from that of any other private citizen and therefore no citizen can have or claim any enforceable or fundamental right with

1. 69 L.W. 993 : A.I.R. 1957 Mad. 149.
2. (1940) 84 Law Ed. 1108.

reference to such exercise by the Government of its rights, since admittedly he has no such a right with reference to a similar exercise by a private citizen.

13. As far as the present case is concerned, condition No. 5 of the auction notice itself states that the sale is subject to confirmation by the District Forest Officer, Nilgiris South Division, Ootacamand or the Conservator of Forests, Coimbatore Circle, Coimbatore, as the case may be, and the right to accept or reject any bid without assigning any reason is reserved. It is only with reference to this condition as well as condition No. 25 the petitioner can bid and has actually bid in one case. If that is so, I am unable to see what vested or enforceable right of the petitioner can be said to have been affected by the presence of condition No. 25, subject to which alone the petitioner bid and purchased the property in question.

14. Article 298 of the Constitution of India states that the executive power of the Union and of each State shall extend of the carrying on of any trade or business and to the acquisition, holding and disposal of property and the making of contracts for any purpose. There are two provisos to this Article, but they are not relevant for the purpose of this case. All that is relevant for the purpose of the present case is to note that this Article contemplates the executive power of the State extending to the acquisition, holding and disposal of property. If so, in the absence of any other provision restricting this power of acquisition, holding and disposal of property, the petitioner cannot contend that its fundamental right to purchase the property of the Government on its own terms is affected and that the imposition of condition No. 25 violates Article 301 of the Constitution of India.

15. Now, I shall refer to the decisions on which reliance was placed on behalf of the petitioner. I have already referred to the fact that Mr. K.K. Venugopal himself admitted that there was no direct decision dealing with Government property with reference to which it has been held that Article 301 or Article 19 (1) (*g*) has been violated. The first decision to which my attention was drawn is that of the Supreme Court in *State of Mysore* v. *H. Sanjeeviah*[1]. In that case, in exercise of the powers conferred on the State Government by section 37 (1) of the Mysore Forest Act, 1900, the Government had made certain rules and those rules contained two provisions enacted on two different occasions. One proviso was :

> "Provided that no such permit shall authorise any person to transport forest produce between sun-set and sun-rise in any of the areas specified in Schedule 'A'. The Second Proviso was :
>
> Provided further that permission may be granted to timber merchants on their requisition to transport timber up to 10 P.M. (22 hrs.) under the following conditions—
>
> (*i*) the party who wishes to avail of the concessions should pay a cash deposit of Rs. 1,000 as security for due compliance with the timber transit rules as in force.
>
> (*ii*) that the deposit may be forfeited to Government for breach of any of the conditions of the Timber Transit Rules.

The Supreme Court struck down these two provisos on two independent grounds. The first was that under section 37 (1) the Government have power to make rules to regulate transit of forest produce but the provisos referred to above are not regulatory in character, but restrictive, and prohibitive in character and that therefore they went beyond the power of the Government to make rules under section 37. The second ground was that the provisos offended Article 301 itself. In my opinion, that decision has no relevancy to the facts of the present case for the simple reason that that case dealt with the right of transport of every forest produce irrespective of to whom it belonged and how it was acquired by the person who wanted to transport the same. Consequently, trade in timber produce itself was generally affected. In view of this, that decision does not throw any light on the controversy raised in this case.

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1. (1967) 2 S.C.J. 313 : (1967) 2 S.C.R. 361 : A.I.R. 1967 S.C. 1189.

16. The next decision relied on by the learned counsel for the petitioner is also that of the Supreme Court in the *District Collector of Hyderabad and others* v. *M/s. Ibrahim and Co., etc.*[1], and it dealt with the case of grant of monopoly by the State Government to the Greater Hyderabad Consumers Central Co-operative Stores Ltd., Hyderabad, for distribution of sugar quota in the twin cities of Hyderabad and Secunderabad. The Supreme Court held that such executive power went beyond the statutory orders in that behalf and therefore such instructions were not valid. In that context reference was made to Article 301 of the Constitution of India also. In my opinion, this decision is also not of any avail for the simple reason that the sugar quota that was allotted was not the absolute property of the Government, but that was one obtained from the manufacturers of sugar on the basis of certain statutory provisions and statutory rights.

17. The next decision on which strong reliance was placed by Mr. K. K. Venugopal, and which, according to him, is the nearest he can think of, as far as the present case is concerned, is that of the Supreme Court in *Rasbihari Panda etc.* v. *State of Orissa*[2]. That case dealt with the construction of section 10 of the Orissa Kendu Leaves (Control of Trade) Act, 1961. In that case what came up for consideration before the Court was the action of the Government with regard to the sale of Kendu leaves in which the State had the monopoly, under the very Act itself. The Government in that case decided to invite offers for advance purchase of Kendu leaves only from persons who purchased these leaves from individual units during the previous year and who acted as purchasers without default and to the satisfaction of Government and the method of sale by open competition was given up. It was this action which was adopted by the Government which was held illegal by the Supreme Court. The Supreme Court stated in paragraph 15 of its judgment :

"Section 10 of the Act is a counter-part of section 3 and authorises the Government to sell or otherwise dispose of Kendu leaves in such manner as the Government may direct. If the monopoly of purchasing Kendu leaves by section 3 is valid, in so far as it is intended to be administered only for the benefit of the State, the sale or disposal of Kendu leaves by the Government must also be in the public interest and not to serve the private interests of any person or class of persons. It is true that it is for the Government having regard to all the circumstances, to act as a prudent businessman would, and to sell or otherwise dispose of Kendu leaves purchased under the monopoly acquired under section 3, but the profit resulting from the sale must be for the public benefit and not for private gain. Section 11 which provides that out of the net profits derived by the Government from the trade in Kendu leaves, an amount not less than one half is to be paid to the Samitis and Grama Panchayats emphasises the concept that the machinery of sale or disposal of Kendu leaves must also be geared to serve the public interest. If the scheme of disposal creates a class of middlemen who would purchase from the Government Kendu leaves at concessional rates and would earn large profits disproportionate to the nature of the service rendered or duty performed by them, it cannot claim the protection of Article 19 (6) (*ii*)."

18. Thus, it will be seen that the right of the Government to sell Kendu leaves under section 10 was correlated to the right of monopoly which was acquired under section 3 to purchase Kendu leaves and the Supreme Court held that just like monopoly of purchase was to serve public interest, the sale must also be to serve public interest. In my opinion, this decision also does not help the petitioner from two points of view. In the first place, this decision does not deal with a case where independent of any statute, the Government are the owners of the properties, and enjoy the same absolutely just like any other person. Secondly, it has not dealt with Article 301 of the Constitution of India, at all, but has dealt

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1. (1970) 2 S.C.J. 609 : (1970) 2 M.L.J. (S.C.) 109 : (1970) 2 An.W.R. (S.C.) 109 : A.I.R. 1970 S.C. 1275.
2. (1969) 2 S.C.J. 680 : A.I.R. 1969 S.C. 1081.

with Article 19 and therefore that has no bearing on the question in issue, as far as the present case is concerned.

19. Having regard to certain observations made in the above judgment, Mr. Venugopal contended that the action of respondents 1 to 4 in permitting the removal of the bluegum wood from the Nilgiris District only for the benefit of Viscose is for the benefit of a private individual or a company and it is not for the benefit of the State Exchequer and therefore the action of the Government is not that of a prudent businessman, as pointed out by the Supreme Court. In my opinion, this contention ignores several facts in the present case. The counter-affidavit filed on behalf of Viscose clearly points out that it requires for its uninterrupted work of the factory areas in the region of about 2400 acres, every acre yielding 25 tons bone dry or 40 tons air dry bluegum and that over and above what it obtained by way of allotment from the Government it had been purchasing bluegum from others also and that in 1973 it had purchased to the extent of nearly 60,000 tons. As a matter of fact, that Viscose is purchasing bluegum over and above that it obtains from the acres allotted to it by the Government is admitted by the petitioner itself, when the petitioner contends that the contractors who are supplying to Viscose alone are permitted to take timber from the Nilgiris District. In para. 4 of the counter-affidavit filed by Viscose, it is stated that Viscose is the only producer of rayon yarn and staple fibre in the State of Tamil Nadu, that its total fixed assets according to its balance-sheet as at 31st December, 1973 is Rs. 16,23,14,129; that the value of the fixed assets of its pulp plant is Rs. 8,32,95,334 and that it employs a labour force of well over 2,000 persons. As already pointed out, the petitioner has contended in para. 5 of the affidavits filed in support of the writ petitions that the current purchase price of the Viscose is Rs. 98·50 per ton while the price of Gwalior Rayons Ltd., offered at Mettupalayam is Rs. 92.75 per ton. From this, it is clear that even if a person like the petitioner is permitted to remove bluegum from the Nilgiris District for the purpose of selling the same to M/s. Gwalior Rayons Ltd., at Mettupalayam, the price being not higher than that offered by Viscose, there is no question of a person like the petitioner bidding for a higher amount at the auction. Apart from this, assuming that the restriction was not present and if an auction was held without such a restriction, the Government were likely, to get more money, it was for the Government to decide whether they should prefer to get a few more rupees by way of removing the restriction or prefer to see that the only industry in the State manufacturing this particular product is not starved and over 2,000 workers who are employed therein are not thrown out of employment. This is a balancing consideration which the State alone will have to take into account and there cannot be an invariable and inflexible rule that in every case, where there is a possibility of getting more money to the State exchequer, the Government should follow that course only and no other course, whatever the other considerations may be.

20. Apart from this general consideration, the counter-affidavit filed on behalf of the Government also points out that there were several persons who bid at the auction and who were not contractors for supplying bluegum to Viscose. In para. 6 of the counter-affidavit filed on behalf of the Government in W.P. No. 2086 of 1974, it is pointed out that at the auction held on 21st June, 1974, 12 units of fuel coupes were sold and that out of the same one unit only was taken by the contractors who have undertaken to supply bluegum to Viscose and all the other 11 units were taken by other persons who have nothing to do with the supply to Viscose. Thus, the very contention of the petitioner that those persons who entered into contracts with Viscose for supply of bluegum stand on a better footing for the purpose of making offers at the auctions, while others do not have that advantage is belied by what had happened at the auction held on 21st June, 1974. Having regard to all these circumstances, I am clearly of the opinion that the argument of the learned counsel for the petitioner based upon Article 301 as well as Article 19 (1) (*g*) of the Constitution of India fails and even the argument based upon the decision of the Supreme Court in *Rasbihari Panda etc.* v.

State of Orissa[1], wherein it was pointed out that the Government will have to act as a prudent businessman will not help the petitioner having regard to the facts of the present case, as explained by me already.

21. Then, there remains the last argument based upon Article 14 of the Constitution of India. I have already referred to the judgment of this Court in *C. V. Rajagopalachari* v. *State of Madras, represented by Secretary to Government, Public Works Department, Madras*[2], dated 6th September, 1951, wherein it was held that the Government had a right to let their property to anybody they pleased and there was no question of violation of Article 14 of the Constitution of India. In this particular case also, the entire thing is in the region of contract. I have already referred to the fact that the notice calling for tenders is an invitation and tender is an offer and after the acceptance of the offer, a regular written contract is entered into between the parties. Therefore, indisputably, the whole transaction is in the region of contract and it cannot be held that Article 14 of the Constitution of India has any application to such a case. Even assuming that Article 14 can have application, I am clearly of the opinion that the classification as between the timber to be supplied to Viscose and other timber is a valid classification. As I have pointed out already, Viscose is the only factory in Tamil Nadu which is manufacturing this rayon yarn and the essential raw material for that manufacture is the bluegum. Therefore, in order to see that that industry is not starved and the persons working therein are not thrown out of employment, if the Government make an exemption in favour of the supply of bluegum to that industry, that will satisfy the requirement of classification on a reasonable basis, having nexus to the object sought to be achieved. Therefore, the argument of the learned counsel for the petitioner, based upon Article 14 of the Constitution of India also fails.

22. There is only one matter to which I must draw attention. As I have pointed out already, there is a memorandum of the Government, dated 7th June, 1966 as well as an order of the Government, dated 26th October, 1966. The learned counsel points out that the very object of imposing restriction, as can be gathered from the memorandum, is to conserve bluegum for the civil population to be used as firewood. In the subsequent Government order, the Government had taken a decision that bluegum need not be used as firewood and that it was enough if the debarked wattle wood was made available to the public for use as firewood. The argument is that once the Governments had taken that decision, the need for imposing a restriction against removal of the bluegum wood out of the Nilgiris District disappeared and therefore the condition in question need not have been continued. There are two answers to this submission. One is, the very same Government order which referred to the debarked wattle wood being made available to the public as firewood instead of bluegum also provided for the continuation of the restriction already imposed. Secondly, the counter-affidavit filed on behalf of the Government has pointed out that the decision taken by the Government that the debarked wattle wood alone may be made available to the public for use as firewood has not yet been implemented. In view of these two factors, there is no substance in this contention of the learned counsel for the petitioner.

23. There was some argument about the Timber Transit Rules. But I do not consider it necessary to refer to the same for the simple reason that the prayers in these writ petitions are only with reference to condition No. 25 in the auction notice and not with reference to anything contained in the Timber Transit Rules.

24. No other point was urged before me. Under these circumstances, all the four writ petitions fail and are dismissed. There will be no order as to costs.

S.J. *Petitions dismissed.*

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1. (1969) 2 S.C.J. 680 : (1969) 3 S.C.R. 374 : A.I.R. 1969 S.C. 1081.
2. C.M.P. No. 6187 of 1951.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*T. Ramaprasada Rao and S. Ratnavel Pandian, JJ.*

Kazimar Periya Pallivasal through its trustees M. Mir Hamidulla Hussaini and others .. *Appellants**

v.

K. A. S. Arumugam and others .. *Respondents.*

Civil Procedure Code (*V of* 1908), *section* 94, *Order* 40, *rule* 1—*Suit for appointment of Receiver—Proceedings pending before Land Tribunal under the Madras Minor Inams (Abolition and Conversion into Ryotwari) Act* (*XXX of* 1963)—*Suit whether maintainable.*

Proceedings were pending before the Land Tribunal between the plaintiffs and defendants regarding grant of Patta under Act (XXX of 1963). Pending such proceedings the plaintiffs filed a suit for the appointment of a receiver in respect of the suit lands. On the question whether the suit was maintainable,

Held, under the Civil Procedure Code, an application for appointment of a receiver is generally made as an interlocutory measure when a main relief is pending adjudication by the Court. It is made either under Order 40, rule 1 or under section 94, Civil Procedure Code. If any person seeks relief under section 94 and *inter alia* asks for the appointment of a receiver, the condition precedent for making such a request is the existence of a main action already initiated by the person seeking the interlocutory relief. As there is no enforceable substantive right in the plaintiff for him to enforce it in a substantive action and as no interlocutory relief by way of appointment of a receiver can be asked without a pre-existing action in which the substantive right is being agitated, the suit is not maintainable.

[*Paras.* 11, 13 *and* 23.]

* A.S. No. 790 of 1970. *22nd January*, 1975.

Cases referred to :—

State of Madras v. *Ramalingaswami Madam* (1969) 2 M.L.J. 281 ; *Md. Marakayar* v. *Udayanachi Ammal*, (1968) 2 M.L.J. 58 : 80 L.W. 424 ; *Marshall* v. *Charteris*, (1920) 1 Ch. 520; *State of Orissa* v. *Ramchandra*, A.I.R. 1964 S.C. 685; *Jha Talomal Khundromal* v. *Bhagwan Prasad Tiwari*, A.I.R 1955 N.U.C. Cases 3355 : *Chandreswar Prasad Narain Singh* v. *Bisheswar Pratap*, (1920) 58 I.C. 405 : 5 P.L.J. 513 ; *Ramswarup Das* v. *Rameshwar Das*, A.I.R. 1950 Pat. 184 ; *Chockalingam Pillai* v. *Pichappa Chettiar*, (1925) 22 L.W. 579 : A.I.R. 1926 Mad. 155 ; *Kochunni* v. *Kunnukuttapunni*, A.I.R. 1964 Ker. 86 ; *Owen* v. *Homan*, (1853) 4 H.L.C. 997.

Appeal against the decree of the Sub-Court, Madurai in O.S. No. 388 of 1968.

A. Sundaram Iyer for *C. A. Mohamed Ibrahim* and *M. Khaja Mohideen*, for Appellants.

K. Parasaran, P. Narasimhan, A. Ramanathan and *R. Vedantham*, for Respondents.

The Judgment of the Court was delivered by

Ramaprasada Rao, J.—The Kazimar Periya Pallivasal, Kazimar Street, Madurai, represented by its trustees, who are the plaintiffs in O.S.No.388 of 1968 on the file of the Subordinate Judge, Madurai are the appellants. The plaintiffs filed a bare suit for the appointment of a receiver for the suit lands and for certain ancillary directions in the following circumstances. The Pallivasal owns properties in Iruvathanallur limits, Madurai District, and the defendants are said to be the lessees in occupation of such lands belonging to the pallivasal which they have been cultivating on a waram basis. After the passing of the Madras Minor Inams (Abolition and Conversion into Ryotwari) Act, (Madras Act XXX of 1963), the inams came to be vested in the Government under section 3 of Act XXX of 1963 and in consequence thereof and as ordained by the provisions of the Act there was an enquiry as to the nature of the rights to which the plaintiffs and the defendants would be entitled to. In the first instance, the Settlement Tahsildar granted a ryotwari patta in favour of the defendants.

On appeal, the appellate Tribunal set aside the order ; and a re-enquiry was directed to be made by the Settlement Tahsildar. It is now reported that on such re-enquiry patta was granted in favour of the Pallivasal, but the defendants have taken up the matter on appeal to the Tribunal (Land Tribunal, Madurai) and the same is pending there.

2. According to the plaintiffs, the defendants who were the lessees and who were cultivating the lands on a waram basis are bound to pay the waram for the lands and cash rent for the cocoanut tope and they having failed to pay the same after the date on which the above Act was notified and as the defendants have no properties of their own it would be just and convenient to grant only relief of appointment of a receiver who could be directed by the Court to harvest and pay half of the produce to the plaintiffs as also the usual cash rent towards the use of the cocoanut topes.

3. The defendants through the 15th defendant claimed that the plaintiffs are not iruwaramdars ; but on the other hand, they are entitled to kudiwaram right in the lands and they are in lawful possession of the suit properties in exercise of their right as kudiwaramdars and that the Government had collected the kist from them and so the plaintiffs are not even entitled to receive kudiwaram produce for the lands as also the rent for the tope. Effectively the defence that a bare suit for the appointment of a receiver, which would impliedly oust the lawful possession of the defendants from the properties, is not maintainable and that the suit is barred by the provisions of the Madras Act XXX of 1963.

4. On the above pleadings the following issues were framed :

1. Whether the suit as framed is maintainable ?

2. Whether the plaintiff is entitled to melwaram ?

3. Whether the suit is barred by Act XXX of 1963 ?

4. To what relief is the plaintiff entitled ?

Additional Issue :

Whether the plaintiff is entitled for the appointment of a receiver for the suit properties as prayed for in the plaint ?

The Court below held that the defendants are in actual possession of the suit lands and their possession is admittedly lawful. It also found that no receiver could be appointed on the only ground that the defendants are poor and they may not be able to pay all the arrears of rent in one lump sum. On the question of maintainability of the action, the Court held that it was not maintainable and in its discretion expressed the view that as there was no complaint of acts of waste on the part of the defendants, it was neither just nor convenient to appoint a receiver. In the result the suit was dismissed. It is as against this, the present appeal has been filed.

5. Mr. Sundaram Iyer, learned counsel for the appellants, based on the analogy of a similar sister enactment *viz.*, the Madras Estates (Abolition and Conversion into Ryotwari) Act (Madras Act XXVI of 1948) contends that the plaintiffs as landholders should be deemed in law to be in possession of the suit lands ; and fictionally and notwithstanding the induction of Act XXX of 1963 their possession as landholders should be deemed to be continuous and in that view they have a present right to seek for the relief of appointment of a receiver so as to protect and safeguard their interests. On the question of maintainability he would say that though the relief is not one normally sought for, yet, the arm of justice could be extended in deserving cases by such appointment of receiver, though the relief asked for is the only relief in a lis. Contending *contra*, Mr. Parasaran, learned counsel for the respondents brought out the main distinction between the working of the two enactments and urged that though the purpose of both the legislations is similar, yet the manner and the *modus operandi* of their working is distinct and separate. Whilst under Madras Act XXVI of 1948, there is no forum prescribed in the matter of adjudication of the rights to obtain patta in so far as a ryot is concerned, he points out that under Madras Act XXX of 1963 a special Tribunal is created for

such enquiries and for the ultimate grant of such patta to the tenant in occupation; and when this distinction is borne in mind, the point in controversy could easily be visualised and appreciated. Furthering his contention, the learned counsel would say that as on the date of institution of the present action neither the respondents nor the appellants could project an existing right which is comprehendable in law as an enforceable right, it would be a travesty of the exercise of jurisdiction by Courts if a receiver is appointed for the mere asking of it. Relying upon precedents of this and other Courts the learned counsel submits that a suit for the appointment of a receiver simpliciter is unknown to law and is a strange and a queer request. He therefore, sustains the ultimate conclusion of the Court below that the suit is not maintainable not only under the common law but also because of the special provisions contained in Madras Act XXX of 1963.

6. It is common ground that the civil Courts have no jurisdiction to grant a patta either under Madras Act XXVI of 1948 or under Act XXX of 1963. Though a forum has not been created for such grant of pattas to persons in occupation of the land under Act XXVI of 1948, yet by practice, the Tribunals created by the statute for the grant of such pattas to the landholder, were enabled to enquire into the competence of an individual in possession of the land to secure such a patta from the same Tribunals which were constituted under that Act to grant such pattas under sections 12 to 14 to the landholder. In juxtaposition to this, we have a special provision in Act XXX of 1963. Section 8 of Act XXX of 1963 says that subject, to the provisions of sub-section (2), every person who is lawfully entitled to the kudiwaram in an inam land immediately before the appointed day whether such person is an inamdar or not shall, with effect on and from the appointed day, be entitled to ryotwari patta in respect of that land. In order to effectuate this provision, a certain hierarchy of officers is created by it who are ordained and enabled to determine the lands in respect of which any person is entitled to a ryotwari patta. Section 11 says so and authorises the Assistant Settlement Officer to enquire into the claims of any person for ryotwari patta under this Act in respect of any inam land and render a decision thereon. Further appeals as against his decision are provided for as is seen from clause (3) of section 11 and section 30 of the Act. It is therefore clear, as was pointed out by a Bench of our Court in *State of Madras* v. *Ramalingaswami Madam*[1]. "We have already pointed out that the grant of a ryotwari patta under the Act is a right created under the Act and that the machinery provided under the Act is the only remedy for obtaining ryotwari patta." The plaintiffs, when they came to Court, were not clothed with any right known to law to seek for a relief in civil Courts. Under section 3 of Madras Act XXX of 1963, with effect on and from the appointed day and save as otherwise expressly provided in the Act, every inam shall stand transferred to the Government and vest in them free of all encumbrances. We are not quoting section 3 *in extenso*. A proviso, however, added by section 2 of the Tamil Nadu Act XXIX of 1971 says that the Government shall not dispossess any person who is personally cultivating any land in a minor inam until the Assistant Settlement Officer and Tribunal and the other appellate Tribunal for appeal, if any, decided that such person is not actually entitled to a ryotwari patta in respect of that land under the provisions of the Act. This basic provision in Act XXX of 1963 positively makes out that on and after the notified date quondam rights of the inamdar as well as the rights of the person in possession of the lands whether as a kudiwaramdar or otherwise got postponed and suspended as if by an automatic operation of the notification under which the Act is notified. During this interrugnam or period of suspension as we characterise it, it is difficult for either an inamdar or any person in occupation to assume and vest in him any right known to law. The civil Court cannot adjudicate or determine whether one or the other is entitled to a patta. Such an investigation is admittedly pending. Until that stage is reached and the determination made by the statutory Tribunals, neither the plaintiffs nor the defendants could come to a civil Court and seek for relief which on the date of such asking is

1. (1969) 2 M.L.J. 281, 298.

in the nature of an expectancy or a bare *spes successionis*. It is elementary that no relief can be asked on rights which are in the nature of expectancies or bare anticipations. No one is sure whether the plaintiffs or the defendants would get the ryotwari patta in accordance with the provisions of the Act. But one thing however is clear that on and from the notified date the inam has vested in the Government free from all encumbrances. Such being the legal as well as the statutory position, it would be idle for the plaintiffs to seek for relief on the basis of a bare expectancy and ask for the sole and the only remedy of appointment of a receiver. Mr. Sundaram Iyer however says that the Courts have the power *de hors* the common law to appoint a receiver in certain situations.

7. Reliance is placed upon a passage in Halsbury's Laws of England, Volume 32, Simonds Edn. para 633, at page 394, which runs thus :—

> "Receivers are constantly appointed pending the trial of an action or pending the constitution of a legal representative of a deceased person, or, if necessary, pending a reference to arbitration or the trial of an interpleader issue or pending proceedings in another Court."

The last sentence is pressed into service. According to the learned counsel as proceedings are pending in another forum, though of course the creature of a statute yet it cannot said that the civil Court has no jurisdiction to appoint a receiver.

8. Again referring to a passage in Kerr on Receivers, 13th Edn., at page 5, the learned counsel says that the object sought by such appointment is to safeguard the property for the benefit of those entitled to it. It would not be out of place for a civil Court to exercise jurisdiction even at the threshold if it is satisfied that in another forum, though not a civil Court, disputes are pending in the matter of the recognition of rights of parties to the property in question or to be more specific in the instant case when an investigation as to the grant of a patta is pending before the Tribunals created under Act XXX of 1963. There is a fallacy in this argument. It is not as if that as on the date when the suit was instituted and even so as on date, there is a dispute as regards the ownership of the property or its possession. What is sought to be agitated before the statutory Tribunals is as to who is entitled to a ryotwari patta to the lands in question. Strong reliance, however, is placed upon a passage in *Md. Mustafa Marakayar* v. *Udayanachi Ammal*[1]. Veeraswami, J. (as he then was), while considering the scope of similar provisions under the Madras Estates Abolition Act (XXVI of 1948), expressed his opinion in the following lines :

> "In effect both possession and title of the person who is entitled to a ryotwari patta are saved from the effect of the notification under section 3 (*b*) and the ownership in such lands continues in the quondam landholder notwithstanding the notifications and the fact that it is subject to determination of the character of the land for which he will be entitled to a ryotwari patta."

In our view, this passage is being torn out of its context so as to serve the interests of the plaintiffs. No doubt, if the landholder obtains a patta on the completion of the enquiry by the statutory Tribunals then if he were in possession of the lands on the notified date he would certainly continue in possession thereof as quondam landholder. But if, on the other hand, the land is in the possession of lessees or tenants the position is different. In view of section 3 of Act XXX of 1963 the ownership of an inam is automatically transferred to the State and it vests in them free from all encumbrances. The vesting of the inam and the lands comprised therein rests as it is on a statutory fiction by which both the ownership and the possession becomes automatically transferred on such notification, only to slope down on the shoulders of the person entitled to a ryotwari patta which entitlement could be found only after investigation by the tribunals. It is in this light we state that the right, if any, which either the landholder or the person in occupation has obtained under the provisions of Act XXX of 1963, is postponed and that there is an interregnum between a notified date and the date when the Tribunals

1. (1968) 2 M.L.J. 58 : 80 L.W. 424.

determines as to who is entitled to a ryotwari patta. During the nebulous period, neither the plaintiffs nor the defendants could, in a manner known to law, project any right known to law and seek relief as if such rights are existing enforceable rights.

9. The learned author Kerr in the same edition referred to above at page 7 contemplated a difficult case like the one under consideration. He says: "Where the object of the plaintiff is to assert a right to property of which the defendant is in enjoyment, the case presents more difficulty. The Court by taking possession at the instance of the plaintiff may be doing a wrong to the defendant; in some cases an irreparable wrong. If the plaintiff should eventually fail in establishing his right against the defendant, the Court may by its interim interference have caused mischief to the defendant for which the subsequent restoration of the property may afford no adequate compensation." (Reliance has been placed upon *Marshall* v. *Charteris*.[1]

10. If, therefore, the plaintiffs seek for a relief at a time when they are not clothed with an enforceable legal right and when they could obtain such a right only on the completion of an enquiry by the statutory Tribunals, and when admittedly such an enquiry is still pending, the plaintiffs cannot seek for relief in a Court on the projection of such inchoate and incomplete rights. In our view, he has merely a bare expectancy in his favour and that is not equated generally in a civil Court to an enforceable right.

11. This leads us on to the question whether a bare suit for receivership is maintainable at all. Under the Civil Procedure Code, an application for appointment of a receiver is generally made as an interlocutory measure when a main relief is pending, adjudication by the Court. It is made either under Order 40, rule 1 or under section 94, Civil Procedure Code. There can be no doubt whatsoever that even section 94, Civil Procedure Code, is not a substantive provision, but a provision which speaks of the existence of a main relief for the grant of a supplemental relief by the appointment of a receiver. Undoubtedly, Order 40, rule 1, contemplates a present action for one or the other of the parties to it to seek for the appointment of a receiver. That is not the case here. The question is whether section 94, Civil Procedure Code, by itself would enable the plaintiff to the relief of appointment of a receiver without a substantive suit laid by him for any comprehenshive purpose otherwise. Section 94 appears in Part VI of the Civil Procedure Code, under the caption " Supplemental proceedings ". The relevant portion reads thus :

> " In order to prevent the ends of justice from being defeated the Court may, if it is so prescribed, appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property and make such other interlocutory orders as may appear to the Court to be just and convenient."

12. The use of the word 'other' in clause (*e*) of section 94 is very significant. That word gives the clue to the content of section 94. Though *primo facie* part VI appears to be substantive in nature and original in application, yet clause (*e*) of section 94 makes it clear that the relief enumerated in clauses (*a*), (*c*) and, (*d*) are only interim in nature meaning thereby that these reliefs mentioned in section 94 could only be granted as an aid or ancillary to a main relief sought for by the person seeking the interlocutory order.

13. In Ramanatha Iyer's Law Lexicon, the word 'supplementary proceeding' has been explained thus :

> " A supplementary proceeding is a separate proceeding in an original action in which the Court where the action is pending is called upon to exercise its jurisdiction in aid of the judgment in action."

It appears to us that if any person seeks relief under section 94 and *inter alia* asks for the appointment of a receiver, the condition precedent for making such a request is the existence of a main action which was already initiated by the person

1. (1920) 1 Ch. 520.

seeking the interlocutory relief. This situation is absent in the instant case.

14. It cannot be said that section 151, Civil Procedure Code, could be invoked in such circumstances. The special excludes the general is elementary principle of law. When the Civil Procedure Code has provided for grant of such a relief of appointment of receiver both under section 94 and under Order 40, rule 1, it would be improper to invoke the inherent jurisdiction of the Code under section 151 to entertain a bare suit for the appointment of a receiver and hold that such interlocutory orders can be made in the absence of a request for any other main relief.

15. In *State of Orissa* v. *Ramachondra*[1] the Supreme Court said that an interim relief can be granted only in aid of and as auxiliary to the main relief which may be available to the party on final determination of his rights in a suit.

16. It therefore follows that it would be difficult for the plaintiff to ask for a bare interlocutory relief of appointment of a receiver. Again there is abundant authority of both our Court and other Courts for the proposition that such a request in the abstract and solely for the purpose of wresting property from the person in lawful possession ought not to be encouraged.

17. A learned single Judge of the Madhya Pradesh High Court in *Jhatalomal Khundromal* v. *Bhagwan Prasad Tiwari*,[2] strongly expressed the view that to file a suit only for the appointment of receiver is queer on the face of it and proceedings for the appointment of a receiver are termed supplemental proceedings in Civil Procedure Code and section 94 contains provisions for general powers of the Court in regard to various kinds of interlocutory orders which it can pass in course of proceedings before it and supplemental proceedings are a means to an end and not an end in themselves.

18. In *Chandreswar Prasad Narasinh Singh* v. *Bisheswar Pratap*[3] a Division Bench of the Patna High Court said that a Court has no jurisdiction to appoint a receiver in respect of property regarding which no litigation is pending.

1. A.I.R. 1964 S.C. 685.
2. A.I.R. 1955 N.U.C. Cases 3355.
3. (1920) 58 I.C. 405 : 5 P.L.J. 513.

19. In *Ramswarup Das* v. *Ramesha Das*[1] another Division Bench of that Court observed :

> " The power conferred on the Court by Order 40, rule 1 (*a*) to appoint a receiver refers only to the appointment of a receiver in respect of property in regard to which litigation is pending, that is to say, as long as the suit remains pending. The Court has no power to direct the appointment of a receiver, or the continuance of the receiver already appointed, to hold charge of the property after the litigation is determined."

Obviously, the learned Judges had in view the situation in respect of property in regard to which litigation is pending in the same Court in which the application for receiver is made when they said "in respect of property in regard to which litigation is pending." The litigation should be pending in the same Court in which the interlocutory relief is asked for.

20 In *Chockalingam Pillai* v. *Pichappa Chettiar*[2] Coutts Trotter, C.J., accepted the contention raised before him that a civil Court cannot by way of receivership do what it cannot do by way of decree in the suit.

21. In this case, the Court cannot grant a patta when the pending litigation before the statutory Tribunals is in relation to grant of patta. If the civil Court cannot grant a patta, it cannot grant the relief of appointment of receiver.

22. In *Kochunni* v. *Kunnukuttapunni*[3], the learned Judges after referring to a passage of the House of Lords in *Owen* v. *Homen*[4] observed thus :—

> "Though the issue of injunction and the appointment of receivers are two forms of specific relief under section 5 of the Specific Relief Act, 1877, a stronger case is required for the latter than for the former. In appointing a receiver

1. A.I.R. 1950 Pat. 184.
2. (1925) 22 L.W. 579: A.I.R. 1926 Mad. 155.
3. A.I.R. 1964 Ker. 86.
4. (1853) 4 H.L.C. 997.

the Court wrests the possession from the defendant and assumes management of the property."

Hence in cases involving ouster of a person in exclusive possession, the applicant has to make out special circumstances necessitating special protection of his rights by the appointment of a receiver; and as such dispossession may be wrong done to the defendant, the Court ought to be very reluctant to grant such a prayer. *A fortiori* in a case where the plaintiff has no rights *in praesenti* but has only a bare expectancy *in future* for obtaining patta he cannot prematurely ask for the appointment of a receiver, resulting in the disturbance of certain rights in the person who is in lawful possession of the property.

23. On the ground that the suit is not maintainable and on the basis that no edifice could be put up without a foundation and as there is no enforceable substantial right in the plaintiff for him to enforce it in a substantive action and as no interlocutory relief by way of appointment of a receiver can be asked without a pre-existing action in which the substantial right is being agitated, we are of the view that the suit is not maintainable and the relief asked for is not only premature but misconceived. The appeal therefore fails and is dismissed. There will be no order as to costs.

24. We are compelled before parting with this case to give a direction to the Minor Inams Abolition Tribunal to dispose of C.M. As. Nos. 82 to 95 of 1972 on its file before the end of March, 1975 and to report the same to this Court.

S.J. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*K. S. Venkataraman and S. Maharajan, JJ.*

Cosmopolitan Club, Madras-2 by its Secretary .. *Petitioner**

v.

The Tahsildar, South East, Madras-4 and others .. *Respondents.*

Tamil Nadu Urban Land Tax Act (XXXIV of 1963), section 26—Levy of urban land tax—Land belonging to members club—Members whether occupying building for residential purposes—Whether club can claim levy at concessional rate.

A members' club owned buildings and grounds and was required to pay Urban Land Tax. The club claimed the concessional rate under section 26 of the Urban Land Tax Act on the ground that the members occupied the premises for residential purposes. On the question whether the club was entitled to the concessional rate,

Held,

1. The occupation of the club by the members cannot at all he said to be for residential purposes. The occupation was only for recreational purposes, for purposes of social intercourse. [*Para.* 10.]

2. Where an individual, major or minor, or a family occupies a building for residential purposes, the concession should be given. Perhaps the concession will also be admissible even where some persons form an association and buy a building for residential purposes only. But beyond that the Legislature does not seem to have been prepared to go. [*Para.* 13.]

3. *Held,* however, that the instant case was a fit one where Government may consider the question of granting concession under section 27 of the Act. [*Para.* 13.]

Cases referred to :—

Young Men's Indian Association, Madras v. *Joint Commercial Tax Officer,* (1963) 14

* W.P. No. 1856 of 1972. 21st *January,* 1975.

S.T.C. 1030: 76 L.W. 704 : A.I.R. 1964 Mad. 63 ; *Joint Commercial Tax Officer* v. *Young Men's Indian Association*, (1970) 26 S.T.C. 241 : (1960) 2 S.C.J. 595: (1970) 2 An.W.R. (S.C.) 103 : (1970) 2 M.L.J. (S.C.) 103 : (1970) 3 S.C.R. 680 : A.I.R. 1970 S.C. 1212 ; *Craff* v. *Evans*, (1882) 8 Q.B.D. 373 ; *Madras Gymkhana Club Employees Union* v. *Management of Gymkhana Club*, (1968) 2 S.C.J. 138 : A.I.R. 1968 S.C. 554 ; *Cricket Club of India* v. *Bombay Labour Union*, (1969) L.L.J. 775 : (1969) 1 S.C.R. 600 : A.I.R. 1969 S.C. 276 ; *Lyene* v. *Commissioners of Land Revenue*, 13 Tax Cases 486.

Petition under Article 226 of the Constitution praying the High Court to issue a writ of *certiorari* calling for the records of the petitioner's case in A. 12125/72, on the file of the respondent and quash the order dated 28th March, 1972 etc.

V. Balasubramaniam and *N. V. Balasubramaniam*, for Petitioner.

Satyadev, Assistant Government Pleader, for Respondent.

The Order of the Court was made by

Venkataraman, J.—The Cosmopolitan club, Madras, which is a well-known members' club, owns 66 grounds 2150 sq. ft. of land in Mount Road. The club was required to pay urban land tax under the Tamil Nadu Urban Land Tax Act, 1963, for eight years from 1st July, 1963 at the standard tax rate of 0-4 p.c. on the market value of the urban land owned by the club. The club claimed that it was entitled to the concession of 25 per cent. under section 26 of the Act, which, so far as material says:

> "26.—(1) Where any building is occupied wholly by the owner for residential purposes only and where such owner makes an application to the Urban Land Tax Officer, that officer shall. . reduce by 25 per cent. the amount of urban land tax payable on the urban land on which the building has been constructed and on the urban land appurtenant to such building".

The Urban Land Tax Officer rejected the claim, observing—

> ". . . . section 26 (1) is very clear that a building occupied wholly by the owner for residential purposes only is eligible for concession of 25 per cent. But in your case it is an association and the land under reference issued for different purposes (*i.e.*, recreational lodging and boarding etc.). Hence the request for concession under section 26 (1) cannot be complied with."

Aggrieved by this order the club filed W.P. No. 1856 of 1972. Another writ petition No. 3069 of 1973 was filed later in respect of Fasli 1381. The point involved is the same.

2. Before dealing with the arguments advanced before us, we can briefly notice the facts which are really not in controversy. The club is a members' club, that is to say, no person who is not a member is admitted to enjoy the benefits of the club, and all the assets really belong only to the members. It was founded in 1873, by a few men of vision. They formed themselves into an association "for social intercourse, discussion, exchange of ideas, recreation etc." In 1934 the members got the club registered under section 26 of the Indian Companies Act, 1913, as a non-profit organisation. As already stated, the club owns 66 grounds 2150 square ft. of land. Upon this land there are a few buildings, and appurtenant to them are vacant spaces requisite for those buildings. The main building houses the administrative offices, members lounge, restaurant, billiard room, card room, library, conference room etc. Behind the main building there are the mofussal quarters wherein mofussal members come and stay. The space in between is occupied by tennis Courts, car parks, pathways and roads. In the front there is a garden. All the buildings and appurtenant lands are in the exclusive occupation of the club for the club's own purposes. No portion of the buildings or appurtenant lands has been let out on rent to any party. The club exists for no purpose other than for its purposes as a members' club. A stranger cannot get in unless he is introduced by a member. If a stranger partakes of refreshments, it has to be paid for by the member who introduces him.

3. The submission of Mr. V. Balasubramaniam, learned counsel for the peti-

tioner, consists of two steps: (*i*) Though normally a company is a different juristic entity from its shareholders, in the case of a members' club, like the petitioner, the incorporation does not make any difference. The club belongs only to the members and the incorporation is only a convenient method for suing and for being sued. It does not alter the character of the members' club. Hence for the purposes of section 26 of the Act, it can be assumed that the building is occupied wholly by the members. (*ii*) The occupation is for residential purposes only.

4. Mr. Satyadev, learned Assistant Government Pleader, concedes, in view of some Supreme Court decisions, that the incorporation does not alter the essential character of a members' club, and that, consequently, we can proceed on the assumption that the buildings are occupied wholly by the members. But, he stoutly resists the second limb of the submission of the petitioner's learned counsel. According to the learned Assistant Government Pleader, the occupation is for recreational purposes; it is not at all for residential purposes, much less for residential purposes, only.

5. Though it is a matter of concession that, for the purpose of section 26 of the Act, incorporation does not make any difference, and the buildings can be said to be occupied wholly by the members, we shall say just a few words explaining the position on that point. Section 7 requires every owner of urban land, liable to pay urban land tax to submit a return. Section 8 specifies the persons who should sign the return in the case of 'an individual, a Hindu undivided family, company, firm, other association and any other person'. Technically, in this case, the owner will be the company. But, the case law shows that, where the company is a members' club, virtually the owners are the members themselves. The importance of this, for the purpose of section 26, is obvious, namely, it is easier for the assessees to build up an argument that the members are occupying the buildings for residential purposes only than to contend that the company is occupying it for residential purposes only. No doubt, in statutes like the Income-tax Act, 1961, there is a distinction between a company resident in India and not resident in India, but the Income-tax Act itself gives a definition to determine that question, and where there was no such definition in England, some tests were applied to determine whether a company was resident in England or not.

6. But the question before us is very limited, namely, whether section 26 of the Tamil Nadu Urban Land Tax Act applies, and it will be noted that there is no definition in the Act of the words "residential purposes" or of the word "residence".

7. The direct case of this Court dealing with this point is reported in *Young Men's Indian Association, Madras* v. *Joint Commercial Tax Officer*[1]. It was a decision of Ramachandra Iyer, C.J. and Anantanarayanan, J. The Young Men's Indian Association was assessed to sales-tax under the provisions of the Madras General Sales-tax Act, 1959, in respect of supply of refreshments by the club to its members. The decision was that there was no sale at all, that the true character of the transaction was that the club merely acted as an agent of the members in purchasing the articles, making them into refreshments and supplying them to the members, that consequently throughout it was only the members as a whole who bought the articles, made the refreshments and distributed them amongst themselves, and that consequently there was not transfer of property which is one of the essential elements of a sale. This decision was upheld on appeal by the Supreme Court in *Joint Commercial tax Officers* v. *Young Men's Indian Association Madras*[2]. At p. 245, (of 26 S.T.C.) their Lordships observed:

> "The law in England has always been that members' club to which category the clubs in the present case belong cannot be made subject to the provisions of the licensing Acts concerning sale

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1. (1963) 14 S.T.C. 1030 : 76 L.W. 704 : A.I.R. 1964 Mad. 63.

2. (1970) 26 S.T.C. 241 : (1970) 2 S.C.J. 595 : (1970) 2 An.W.R. (S.C.) 103 : (1970) 2 M.L.J. (S.C.) 103 : (1970) 3 S.C.R. 680 : A.I.R. S.C. 1212.

because the members are joint owners of all the club property including the excisable liquor. The supply of liquor to a member at a fixed price by the club cannot be regarded to be a sale. If however, liquor is supplied to and paid for by a member who is not a *bona fide* member of the club or his duly authorised agent there would be a sale. With regard to incorporated clubs a distinction has been drawn. Where such a club has all the characteristics of a members' club consistent with its incorporation, that is to say where every member is a shareholder and every shareholder is a member, no licence need be taken out if liquor is supplied only to the members. If some of the share-holders are not members or some of the members are not share-holders, that would be the case of a proprietary club and would involve sale. Proprietary clubs stand on a different footing. The members are not owners of or intersted in the property of the club. The supply to them of food or liquor though at a fixed tariff is a sale. (*See* Halsbury's Laws of England, 3rd Edn. Vol. 5 pages 280-281). The principle laid down in *Graff* v. *Evans*[1], had throughout been followed. In that case Field J., put it thus: "I think, the true construction of the rules is that the members were the joint owners of the general property in all the goods of the club, and that the trustees were their agents with respect to the general property in the goods".

The difficulty felt in the legal property ordinarily vesting in the trustees of the members' club or in the incorporated body was surmounted by invoking the theory of agency, *i.e.*, the club or the trustees acting as agents of the members......What was essential was that the holding of the property by the agent or trustee must be a holding for and on behalf of and not a holding antagonistic to the members of the club."

At page 247 they observed:

"The final conclusion of the High Court in the judgment under appeal was that the cases of each club was analogous to that of an agent or mandatory investing his own moneys for preparing things for consumption of the principal, and later recouping himself for the expenses incurred.............
As no transaction of sale was involved there could be no levy of tax under the provisions of the Act on the supply of refreshments and preparations by each one of the clubs to its members".

1. (1882) 8 Q.B.D. 373.

This was a judgment of five of their Lordships. Shah, J. also agreed with the final result.

8. Mr. Satyadev, referred also two other decisions of the Supreme Court, where it was held that the incorporation does not alter the character of the members' club: *Madras Gymkhana Club Employees Union* v. *Management of Gymkhana Club*[1] (*e.g.*, paragraph 32 to 34: and *Cricket Club of India* v. *Bombay Labour Union*[2], paragraph 14 at page 285).

9. Mr. Balasubramaniam, referred also to 5 Halsbury (Simonds) 3rd Edn., pages 255-255, and 6 Halsbury (Hailsham) 4th Edn., pages 58-59, where members' clubs are divided into unincorporated members' club and incorporated members' clubs. In respect of an unincorporated members club, it is stated:

"It is not recognised as having any legal existence apart from the members of which it is composed".

Under the heading of 'Incorporated members' clubs', the following is stated:-

"A members' club incorporated under the Companies Act, 1948, or earlier Companies Act, enjoys the advantages incidental to incorporation as a company, especially that of suing and being sued as a legal entity".

He also referred to Roscoe Pound's Jurisprudence, Vol. IV, at page 250, where Jhering's (Cracket) Theory in respect of incorporated association is discussed. It is stated.

1. (1968) 2 S.C.J. 138 : A.I.R. 1968 S.C. 554.
2. (1969) 1 S.C.R. 600 : (1969) L.L.J. 775 at 784 : A.I.R. 1969 S.C. 276.

"In this theory of incorporated associations (happily called by Maitland the Cracket theory) the members of an incorporated association are considered the bearers of rights and as bound by the duties which for convenience are referred to as the rights and duties of the corporation itself".

10. We can therefore proceed on the basis that the incorporation of the club does not matter, and that, for the purpose of section 26 of the Act, the building is occupied wholly by the members of the club. The more important question is whether the occupation is for 'residential purposes only'. In our opinion, the occupation of the club by the members cannot at all be said to be for residential purposes. The occupation is only for recreational purposes and for purposes of social intercourse. The term 'residential purposes' is not defined in the Act, and its meaning is what an ordinary layman would understand by it. The common man, in our opinion, will not say that the members occupy the club for residential purposes. He would only say that the members resort to the club for recreational purposes and for purposes of social intercourse etc. He would further say that each of the members has his own residence and comes to the club only for other purposes, like recreation, meeting others etc. We have no hesitation in adopting this common man's interpretation Without meaning any offence or disrespect to the learned counsel for the petitioner, we would venture to remark that the Legislature must have thought, when it used the term 'residential purposes only' that there could be no doubt about the matter, and the Legislature could not have imagined that an argument could be put forth at all in respect of a members' club like the Cosmopolitan Club, Madras that its building is occupied by the members for residential purposes or for residential purposes only. The mofussil quarters are, no doubt, occupied as temporary residence, by the mofussil members, but such temporary residence, is only part of the amenities extended to the mofussil members as members of the club, and we doubt whether that would qualify as 'residential purposes only' under section 26 of the Act. In any case, that is only on a small portion of the buildings in the club and the main buildings are occupied for purposes of recreation, social intercourse, taking refreshments etc., which are not at all residential and therefore, it cannot be said that the buildings, taken together, are occupied wholly for residential purposes only.

11. In our view, the position is very clear and simple and it is unnecessary even to refer to the dictionaries. We may, however, refer to some of the standard dictionaries. The Concise Oxford dictionary, which everybody uses, has this to say:

Reside—(of persons) have one's home, dwell permanently.

Residence: 1. residing, dwell; 2. place where one resides, abode of.

Residential: suitable for or occupied by private houses; connected with residence.

The Shorter Oxford English dictionary says:

Reside : 1. To settle; to take up one's abode or station.

2. To dwell permanently or for a considerable time to have one's settled or usual abode, to live in or at a particular place.

Residence : 1. To have one's residence; to have one's usual dwelling place or abode; to reside; to take up one's residence, to establish oneself; to settle;

the circumstances or fact of having one's permanent or usual abode in or at a certain place; the fact of residing or being resident;

2. the fact of living or staying regularly at or in some place for the discharge of special duties;

3. the place where a person resides ; his dwelling place; the abode of a person;

Residential.—serving or used as a residence; adapted or suitable for the residence of those belonging to the better class characterised by houses of a superior kind; connected with, pertaining or relating to residence.

Words and Phrases, Permanent Edition by West Publishing Company, under the heading 'residential' says :

> A house a portion of which was used in the practice of dentistry, was not being used exclusively for 'residential' purposes.
>
> 'Residential' means used, serving, or designed as a residence or for occupation by residents or residences, as residential trade, occupied by residents, as a residential quarter; or, pertaining to, or connected with, residents or residences residential trade qualifications, or, zones : or pertaining to a resident.
>
> *Residential building*—A residential building, within restrictive covenant, is a building which is used for residential purposes, that is, one in which people reside or dwell or in which they make their homes, as distinguished from one which is used for commercial or business purposes.
>
> *Residential purposes* : Where deed of housing authority contained valid covenant restricting use of realty sold to 'residential purposes', and purchaser purchased the lots with full knowledge of the covenant, use of the reality for church purposes would violate the restrictive covenant.

Stroud's Judicial Dictionary. 4th Edn., at page 2358, says:

> 'Residence' signifies a man's abode or continuance in a place.
>
> "......I take that that word where there is nothing to show that, it is used in a more extensive sense, denotes the place where an individual eats, drinks and sleeps, or where his family or his servants, eat, drink, and sleep.. A man's residence is where he habitually sleeps.

Webster's Third New International dictionary says:

> *Reside*: 1. to settle oneself or a thing in a place; be stationed:
>
> 2. to dwell permanently or continuously; have a settled abode for a time; have one's residence or domicile;
>
> 3. to have an abiding place.
>
> *Residential*: 1. used, serving or designed as a residence or for occupation by residents:
>
> 2. adapted or restricted to or occupied by residences:
>
> 3. relating to or connected with residence or residences.

Mr. Balasubramaniam has contended that even an individual residing in a particular house with his family may have a billiards table or tennis court in his house, or appurtenant to it and it will not be said that he is not residing in his house merely because of the existence of the billiards table or tennis court. Proceeding, he submits that, if, instead of having a billiards table and tennis court in his house, he goes to the Cosmopolitan club for playing billiards or tennis, it can be said that he resorts to the club for residential purposes. In owr opinion, this argument is untenable. The vast majority of people do not have billiards tables or tennis courts in their houses and hence the existence of a billiards table or tennis court is not usually considered as an incident to residence. Indeed, it is precisely because an ordinary man cannot have a billiard table or tennis court in his house, he goes to the club to play billiards or tennis, and that purpose served by the club cannot in any sense be termed a residential purpose.

12. Mr. Balasubramaniam referred to *Lyene* v. *Commissioners of Inland Revenue*[1], and the observations of Lord Hanworth, M.R. (at page 497) The question in that case was whether the appellant therein was a resident or ordinarily resident in the United Kingdom for the purposes of some provision of the Income-tax Act. The facts were briefly these. He was a British subject and until March, 1918, he was a house-holder in London. He then surrendered the lease of his house and sold his furniture, and from March, 1918 until January, 1925, he did not occupy any fixed place of residence, but lived in hotels, 'whether in this country or abroad'. He was admittedly resident and ordinarily resident in the United Kingdom until December, 1919. He then

1. 13 Tax Cases 486.

went abroad and in each subsequent year he had spent between 7 and 8 months abroad and between 4 and 5 months in the United Kingdom. The Commissioners were satisfied, upon the evidence, that when he left the United Kingdom in December, 1919, he had formed the intention, which he had consistently carried out ever since, of living abroad for the greater part of the year, but of returning to that country each year and remaining there for considerable periods but not for a period equal on the whole to six months in any year. It was held that he was resident and ordinarily resident in the United Kingdom. This decision was upheld by the Court of appeal. It was in that connection that, after dealing with the case-law, Lord Hanworth, M.R., observed that it was not possible to frame a concrete definition of the word 'residence'. He proceeds:—

> "Residence must depend on questions of degree and of fact; and I think the Commissioners were right in saying that the subject's claim to exemption must be determined on the balance of the facts in each case.
>
> I suggest as a characteristic factor for consideration, even if it does not fulfil the nature of a test, to ascertain if the suggested alternative place of residence is one which the subject seeks willingly and repeatedly in order to obtain rest or refreshment or recreation suitable to his choice; where for a time he is embedded in the enjoyment of what he desired to attain, and found in the abode of his option.
>
> Another factor may be found—and an important one—if he returns to and seeks his own fatherland in order to enjoy a sojourn in proximity to his relations and friends."

The passage on which Mr. Balasubramaniam relies is this:

> "........to ascertain if the suggested alternative place of residence is one which the subject seeks willingly and repeatedly in order to obtain rest or refreshment or recreation suitable to his choice".

Using this language, Mr. Balasubramaniam submits that Cosmopolitan Club is one which a member 'seeks willingly and repeatedly in order to obtain rest or refreshment or recreation suitable to his choice', and argues that, according to the suggestion of Lord Hanworth, the Cosmopolitan Club can be said to be occupied by the members for residential purposes. In our opinion, this submission is far-fetched. The observations must be understood in the background of the facts of that case. No question arose there similar to the present. There was no doubt that whatever place the assessee was occupying, it was for residential purposes and the only question for decision there was whether he was resident and ordinarily resident in the United Kingdom. The question here is, however entirely different, namely, whether the occupation of the Cosmopolitan Club by its members is for residential purposes at all and for residential purposes only.

13. Mr. Balasubramaniam laid great emphasis on the fact that the club made no profit and distributed no dividends to the members. But this will only mean that the occupation of the building is not for commercial purposes. But it does not follow therefrom that, the occupation is for residential purposes only. The assumption in the submission consists in thinking that the only alternative to commercial purpose is residential purpose. Actually there is at least one other alternative, like recreational purpose and purposes of social intercourse. To put it in another way, if the Legislature was anxious to give the concession to any person or set of persons using a building otherwise than for commercial purposes, it would have been the easiest thing to enact a provision to that effect; but the Legislature has limited the concession by using the words 'for residential purposes only'. When the words are clear, it is really unnecessary to go into the reason why the Legislature used the words 'for residential purposes only'. But, taking the different juristic entities mentioned in section 8 of the Act, it seems to us fairly clear that, where an individual, major or minor, or a family occupies a building for residential purposes only, the concession should be given. Perhaps the concession will also be admissible even where some persons form an

association and buy a building for residential purposes only. But beyond that the Legislature does not seem to have been prepared to go. However, it seems to us that this is a fit case where the Government may consider the question of granting concession under the provisions of section 27 of the Act.

14. The writ petitions are accordingly dismissed, but without costs.

S.J. ——— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—*K. S. Venkataraman* and *N. Krishnaswami Reddy, JJ.*

L. Arunachalam .. *Appellant**

v.

The Deputy Chief Mechanical Engineer, S. Railway, Madras and another .. *Respondents*

Railway Servants (Discipline and Appeal) Rules (1968), sections 2—Indian Railway Establishment Code, Rule 145—Railway employee—Entering service by giving false date of birth—After 21 years service fraud detected by Department—Employee removed from service—Whether correct.

The words 'for good and sufficient' which occur in the Railway Servants (Discipline and Appeal) Rules, are of sufficient amplitude, so as to permit the department to take into account the fraud played by an employee for entering the job.

[*Para.* 10.]

Rule 145 of the Indian Railway Establishment Code does not prohibit the department from punishing railway servants for false declaration of age, from inflicting even the punishment of removal. [*Para.* 24].

Cases referred to :—

State of Andhra Pradesh v. *Sri Rama Rao*, (1964) 3 S.C.R. 25 : (1964) M.L.J. (Crl.) 221: (1964) 1 S.C.J. 402: A.I.R. 1963 S.C. 1723; *Hiro Lilaram Chablani* v. *State of Hyderabad*, A.I.R. 1953 Hyd. 48; *Ishwar Singh* v. *President of Dt. Board, Muzaffarnagar*, A.I.R. 1961 All. 292; *Abdul Aziz Khan* v. *Union of India*, (1975) S.L.J. 597; *Shivadas Khajuria* v. *State of J & K.*, A.I.R. 1959 J. & K. 3, 161; *Viswanathan* v. *Dy. Director of Agriculture, Adilabad*, (1974) A.P.H.N. 141; *Ramavarma Raja* v. *State of Kerala*, (1970) 1 L.L.J. 526 : A.I.R. 1969 Ker. 317; *L.K. Krishnan* v. *State of Madras*, (1972) 1 M.L.J. 1: 84 L.W 761; *Umashanker Misra* v. *Board of High School and Intermediate Education, U.P.*, A.I.R. 1974 All. 290; *State of Orissa* v. *Bidya Bhushan Mohapatra*, (1963) 1 S.C.R. 648 (Supp.): A.I.R. 1963 S.C. 779.

Appeal under Clause 15, Letters Patent against the order of Ismail, J., dated 13th March, 1974 in W.P. No. 502 of 1974.

Mrs. Leela Seetharam, for Appellant.

G. Ramaswami, K. Venkateswara Rao; R. Raman, M. A Sadanand, for Respondents.

The Order of the Court was made by

Venkataraman, J.—The appellant was employed in the Loco Works, Perambur, in the Southern Railways. He was removed from service with effect from 30th July, 1973, by order dated 28th July, 1973 by the Deputy Chief Mechanical Engineer, Mechanical Works, Perambur. He preferred an appeal to the Superintendent, Mechanical Works (Personnel). That authority dismissed the appeal on 29th August, 1973. To quash the order of removal, he filed W.P. No. 502 of 1974 in this Court, which was dismissed by Ismail, J. at the admission stage. This writ appeal has been filed against the order of Ismail, J.

2. The appellant entered the railway service as a trade apprentice on 20th February, 1948. The rules required that an applicant for that post must have attained the age of 17 years and should not have attained the age of 19 years on 1st December, 1947. The appellant, in his application dated 9th February, 1948, gave his date of birth as 20th April, 1929. On 20th February, 1948 he was appointed on the basis that his date of birth was 20th April, 1929. If that was his date of birth, he was certainly

* W.A. No. 355 of 1974. 20th January, 1975.

eligible for the appointment. In support of the date of birth furnished by him, the appellant is alleged to have produced a transfer certificate purporting to have been issued by the Methodist Mission Secondary School, St. Thomas Mount, and that showed his date of birth as 20th April, 1929. In his application, the appellant gave his father's name as Loganathan and in fact he styled himself as L. Arunachalam. On the basis of the above representation, he was appointed.

3. After the appellant had put in 21 years of service, ill-feeling developed between him and one Sahadevan. Sahadevan claims that he and the appellant are sons of one Ekambaram but by different wives and the appellant being the son through the third wife. According to Sahadevan, the appellant never studied in any school in St Thomas Mount. He gave a complaint to the Vigilance Department of the railways, stating that the appellant had secured his job by false representation. The complaint was enquired into and according to the department, the transfer certificate which the appellant had produced was a bogus certificate. According to the department, the appellant did not study at all in the Methodist Mission Secondary School in St. Thomas Mount and such a certificate had not been issued at all by the authorities of that school. Further, according to the department, the real date of birth of the appellant was 10th May, 1926. Further, the appellant's father was Ekambaram and not Loganathan. The case of the department is that if the appellant had given his real age and his father's name, he would not have been eligible at all for appointment in view of the age restrictions and that was why he produced a bogus transfer certificate giving his date of birth which would make him eligible and in order to cover up any possible investigation he also gave out his father's name wrongly as Loganathan instead of Ekambaram. Further particulars of the fraud played by the appellant are also alleged. The Department accordingly framed the following charge against the appellant on 31st March, 1970:

> "That you secured appointment as Trade Apprentice on 20th February, 1948 in Carriage Works P.W.P. by producing (1) a bogus transfer certificate; (2) showing your uncle's name as your father's name; you thus procured appointment in false antecedents".

Enquiry was made by one Sri N. Aravamudhan. He held the charge to be proved. The disciplinary authority accepted the findings and removed the appellant from service.

4. Against that order, the appellant filed W.P. No. 460 of 1972. Ramaprasada Rao, J., allowed it on 17th April, 1973 on the ground that the enquiry had not been properly conducted. He gave liberty to the department to hold a fresh enquiry.

5. Accordingly, a fresh enquiry was made, by one Sri V. Rama Iyer. It was an elaborate enquiry. He submitted his findings holding the charges proved. The disciplinary authority agreed with the findings and gave an opportunity to the appellant to show cause as to why he should not be removed from service. After considering his explanation, the disciplinary authority passed the order of removal on 28th July, 1973. Against that order, the appellant filed W.P. No. 4393 of 1973. Ramaprasada Rao, J., dismissed it on the ground that the departmental appeal was the proper remedy and observed—"This is not a case where *prima facie* it appears to me that the rules of natural justice have been violated. W.A. No. 145 of 1973 was filed against the said order, but was dismissed on 9th August, 1973. The appellant then filed an appeal departmentally to the Superintendent, Mechanical Workshops, and that authority dismissed the appeal by order dated 29th March, 1973. Against that order, this writ petition W.P. No. 502 of 1974 was filed.

6. Before the departmental authority, the appellant maintained that his real date of birth was 20th April, 1929 and not 10th May, 1926. He admitted that his father was Ekambaram and that Loganathan whom he mentioned as his father was only his father's brother. But, he claimed that Loganathan brought him up as his foster father and that was why he mentioned Loganathan as his father. He alleged that it was long afterwards

he came to know that his father was Ekambaram.

7. It was stated before us by Sri G. Ramaswami, the Senior Standing Counsel for the Railways, that the punishment of removal was imposed under the Railways' Servants (Discipline and Appeal) Rules, 1968. The particular provision appears under section 2 and is to the following effect—

> "The following penalties may for good and sufficient reasons and as hereinafter provided be imposed on a railway servant, namely....(viii) removal from service which shall not be a disqualification for future employment under the Government or railway administration; (ix) dismissal from service which shall ordinarily be a disqualification for further employment under the Government or railway administration......"

Mrs. Leela Seetharam, learned counsel for the appellant, contended before us (1) that the disciplinary authority had no jurisdiction at all to pass the order of removal, (2) that there was no evidence before the departmental authority in support of the charge and he only acted on suspicion, and (3) that grave injustice was caused to the appellant, because the enquiry was started 21 years after the alleged misrepresentation and the necessary material evidence had disappeared and it was unfair to the appellant.

8. It would be convenient to take up points 2 and 3 first. It is well-settled that if there is some evidence before the department, this Court cannot interfere in writ proceedings. *State of Andhra Pradesh* v. *Sri Rama Rao*[1], But, if there is no evidence this Court can interfere. That is why the appellant's learned counsel represents that there is no evidence. We have gone through the records. But, we find that there were sufficient materials before the department in support of the charge. In fact, the materials were ample. It is not necessary even to indicate the materials because the orders of the enquiry officer Sri V. Rama Iyer and the disciplinary authority Sri Krishnamurthi are very detailed. It is enough to point out the following. It is strange that the appellant should have given his father's name as Loganathan when his father was Ekambaram. He himself admits that fact now: but he would say that he came to know his father's name only later. His explanation is absolutely unacceptable. The appellant would say that he was brought up by Loganathan. But it is disproved by the evidence of Sahadevan and another witness Ramachandran. According to their evidence, the appellant did not study at all in any school in St. Thomas Mount, but studied only in St. Pauls High School, Vepery. Actually, that is what appears from the records of St. Pauls High School, Vepery and the earlier school, Galavala Gunnan Chetti High School, Perambur. The admission registers and the transfer certificates of these schools have been brought by the relevant authorities of those schools and the records have come from proper custody. They show that one E. Arunachalam, whose date of birth was 10th May, 1926, was admitted in Galavala Gunnan Chetti High School, Perambur, on 16th June, 1943 and that he left the school on 15th April, 1944. His guardian is mentioned as E. Murugesan, (the evidence of Sahadevan is that this Murugesan is his brother). This E. Arunachalam joined St. Pauls High School, Vepery, Madras on 26th June, 1944 and left in April, 1946. There again, his name was mentioned as E. Arunachalam. His guardian was mentioned as E. Murugesan, and the appellant's date of birth was mentioned as 10th May, 1926.

9. Apart from all these, evidence was forthcoming from the records of the Methodist Mission Secondary School., St. Thomas Mount, that no certificate like the transfer certificate Exhibit P-1, was issued at all from that school. It was clearly a bogus certificate. There were thus ample materials before the departmental authorities to come to a finding that the charge had been proved. We are thoroughly satisfied that the enquiry was conducted after observing all the formalities and principles of natural

1. (1964) 3 S.C.R. 25 at 32 : (1964) M.L.J. (Crl.) 221 : (1964) 1 S.C.J. 402 : A.I.R. 1963 S.C. 1723.

justice. It is true that the enquiry was started after 21 years. But, there is no legal bar and we are satisfied that the evidence which has been produced is such that could be accepted even after a lapse of 21 years. There is no substance in points 2 and 3 made by the learned counsel for the appellant.

10. We shall now proceed to consider the question of jurisdiction. This is put on more than one ground by the learned counsel for the appellant. The main ground put forth is that the alleged fraud of the appellant was committed before he was entertained in service, that is to say, when he was not in railway service, and such bad antecedents could not be made a ground of punishment, particularly 21 years later. Before discussing the authorities relied on by the learned counsel, we would observe that the words 'for good and sufficient' which occur in the Railway Servants (Discipline and Appeal) Rules, are of sufficient amplitude so as to permit the department to take into account the fraud played by the appellant for entering the job. If he had mentioned the real facts, he would not have been eligible at all. Such a fraud, which goes to the very root of his appointment, is a good and sufficient reason even for his dismissal if the authorities so choose. If we were to hold otherwise, it would mean that if somehow an applicant, who plays a fraud, happens to be entertained in service, the department would be totally powerless to remove him from service and it would be obliged to continue him in service. That would be putting a premium on dishonesty. It is even possible to conceive of an extreme case of a candidate bribing the appointing authority on a false representation as to his age and getting employment. If, as the learned counsel contends, the department cannot interfere once he has been entertained, that would be a sorry state of affairs. It is necessary to remember that the fact that the fraud was detected 21 years afterwards is not at all relevant in deciding this question, because if the submission of the learned counsel were correct, it would mean that even if the fraud had been discovered a day after the appellant was entertained in service, the department would have had no jurisdiction to remove him from service.

11. There are two unreported decisions of this Court directly supporting the view which we have indicated above, *viz.*, (1) order dated 21st November, 1963 of Srinivasan, J., in W.P. No. 1041 of 1961 and (2) the judgment of Anantanarayanan, C.J. and Natesan, J. dated 16th October, 1967, in W.A. No. 162 of 1964, confirming the above order. The petitioner was alleged to have obtained employment by falsely representing that he was the son of one Chella Perumal, who was a railway employee, since railway employees were given preference in the matter of appointment to inferior posts. The department alleged that he was not the son of Chella Perumal. The petitioner claimed that he had been adopted by Chellaperumal, but that was disproved. The petitioner was entertained in 1944 and the proceedings were started in 1960. A similar contention was advanced that a misrepresentation before he was entertained could not be taken note of. This contention was repelled by Srinivasan, J., thus:

> "The contention that the railway has no authority to punish a misconduct where such misconduct was not committed during the course of the employment may no doubt be generally correct. But, it seems to me where this misconduct has relation to the employment, in the sense that by a false representation the petitioner successfully obtained the employment 'when he might not have obtained the employment but for the alleged false relationship, the railway is not prevented from taking note of the fact of false representation made by the petitioner which is so intimately linked with procuring the order of employment from the railway, and the misconduct to my mind, became a misconduct which the railway cannot ignore and is competent to take note of. This contention also fails."

This reasoning was affirmed by the Bench in the appeal. The Bench observed :

> "The words 'serious misconduct' are not qualified by any such further expression as misconduct in relation to the service or duty of the concerned

employee, after his appointment. We can very well conceive of a case where, for instance, by the gross blackmail of an appointing authority by a person who knows some fact about such authority's private life, which that authority would dread to be disclosed, an appointment is actually obtained. Can it be pleaded, for a moment, that this is not 'serious misconduct' of which the railway administration can take notice, when the true facts later come to light?"

12. In the book "Employees' Misconduct" by Alfred Avins, at pages 496-498 it is pointed out that while there is some difference of opinion on the question whether getting a job by false representation as to age would amount to an offence of cheating by way of contrast, the cases are unanimous that obtaining employment by lying to get the job is industrial misconduct.

13. In *Hiro Lilaram Ghablani* v. *State of Hyderabad*[1], an officer was dismissed on the ground that he had given a false date of birth at the time of his appointment. The order of dismissal was set aside on the ground that there had been a violation of the Constitutional guarantee contained in Article 311 of the Constitution. The detailed discussion would have been totally unnecessary, if it was felt that no order of dismissal could be passed, because the furnishing of the false date of birth was prior to the appointment and was therefore irrelevant. This case is, therefore, an implied authority for the position that furnishing a false date of birth can always be made a ground for removal from service.

14. In *Ishwar Singh* v. *President of District Board, Muzaffarnagar*[2] the services of one Ishwar Singh were terminated on the ground that he was not a qualified person to hold the post since he had not passed the vernacular final examination. In his initial application for appointment, he had misrepresented that he had passed the vernacular final examination. The only plea put forward by him was that he was dismissed by the Vice-President while he could be dismissed only by the President. It was held that actually the Vice-President was competent to exercise the power because of the incapacity of the President. This case is also an implied authority for the position that on the ground of disqualification as to age, an order of removal can be passed.

1. A.I.R. 1953 Hyd. 48.
2. A.I.R. 1961 All. 292.

15. Mrs. Leela Seetharam on her part has not been able to cite any direct decision in favour of the appellant. She cited the decision of Fazl Ali, J. in *Shivadas Khajuria* v. *State of Jammu and Kashmir*[1] The petitioner there was a temporary clerk and was discharged without any opportunity being given to him to defend himself before the order was passed. It was on that ground that the writ petition was allowed. Mrs. Leela Seetharam however, relied on the following passage at para. 17:

> "Lastly, it was contended by the Advocate-General that the petitioner misrepresented his age to the department at the time of his appointment was, therefore, itself *ultra vires*. This argument, however, cannot be entertained at this stage for the simple reason that it was the duty of the department to satisfy itself about the competency of the candidate before his appointment. After the department had chosen to appoint the petitioner he would certainly be clothed with all the rights and safeguards that the Constitution provides and these rights cannot be taken away merely by the fact that there was some misrepresentation at the time of appointment. These matters are absolutely extraneous and irrelevant for the purposes of the present case."

16. Mrs. Leela Seetharam relies on the observations that it was the duty of the department to satisfy itself about the competency of the candidate before his appointment. It may be noted that in that case no regular charge had been framed that the petitioner had misrepresented his age and that therefore he was liable to be discharged. Hence, that case can be distinguished. If the observation means that the department would have no jurisdiction to frame a charge and discharge him after due enquiry, we would respectfully differ from the observation.

1. A.I.R. 1959 J. & K. 3, 161.

17. Mrs. Leela Seetharam then refers to the decision of Asthana, J. as he then was, of the Allahabad High Court, *Abdul Aziz Khan* v. *Union of India*[1]. There, one Abdul Aziz Khan was terminated from railway service on the ground that he had procured the appointment as loco cleaner by deceitful means and had, therefore, committed gross misconduct and failed to maintain absolute integrity and devotion to duty. He filed a suit to set aside the order. The trial Court decreed the suit. The appellate Court dismissed the suit. In second appeal, the trial Court's decree was restored Asthana, J., found that the charges had not been proved at all, and there was no evidence to support the charge. The case is, therefore, distinguishable. However, some observations were made, and Mrs. Leela Seetharam relies on those observations, which read :

> " Further he was accused of having continued in the railway service without disclosing true facts to the administration. If anything the charge so framed is not only vague to a great extent but also is defective. Securing appointment as loco clearner by deceitful means could not be in the course of performance of his duty as a railway servant by the plaintiff. It is, therefore, not easily understandable how the alleged appointment of the plaintiff as a cleaner in Loco department would amount to gross misconduct and will show lack of maintenance of absolute integrity and devotion to duty. Assuming that plaintiff did procure and appointment as Loco cleaner by resorting to deceitful means no question of his disclosure arises to the administration. It would be for the administration to discover the fraud which it alleges to have discovered when Sri Dahiya, the Assistant Personnel Officer, examined the matter of appointment while reconstructing the records."

18. The observations must be understood in the light of the charge framed. The learned Judge does not say that if it had been established that the appellant secured the appointment by deceitful means, it would not be a valid ground for removing him from service. Indeed, the detailed discussion shows that because the learned Judge felt that if the charge had been established, the appellant could be removed from service, there is a detailed discussion of the merits. Indeed, at page 604, the learned Judge refers to the fact that there was no evidence before the enquiry Committee that the plaintiff was in conspiracy with the clerks in the office and was instrumental in procuring the letter of appointment. This suggests that if there had been evidence, the conclusion would have been different. In this case, however, it has been established that the plaintiff got his appointment by deceitful manner.

19. Mrs. Leela Seetharam then relies on *Viswanathan* v. *Deputy Director of Agriculture, Adilabad*[1]. The extract of the judgment of Gopal Rao Ekbote, C.J. and Lakshmaiah, J , relied on, runs as follows:

> " A careful and analytical reading of R.24 (*a*) would disclose that the termination of probation is postulated in the subsequent conduct of the probationer. Under sub-Rule (*a*) (i) his probation can be suspended and he can be discharged from service for want of vacancy which naturally is a subsequent event. Likewise under sub-Rule (*a*) (iii), the probationer can be put under another officer in order to find out whether the previous report was correct. No doubt, sub-Rule (*a*) (iii) confers discretion either to extend the period of probation or terminate the probation and discharge him from service after giving him one month's notice or pay in lieu of such notice. But it is obvious that such a discretion has to be exercised not only keeping in view the purpose for which it is conferred but also in accordance with well-settled principles in that behalf. If that provision is read along with the other contextually connected provisions of that rule, it will be clear that the probation can be either extended or terminated under that provision only because of any event which occurs subsequent to his being placed on probation. It is therefore highly doubtful, whether the probation can be terminated on the ground that

1. (1975) S.L.J. 597, 602.

1. (1974) A.P.H.N. 141.

his character and antecedents were such that he was not eligible for appointment. This is further strengthened by the language of rule 12 (b) (1) (i). If a person's character and antecedents disqualify him from being appointed as a Government servant, then his appointment itself will have to be cancelled, and in such a case no question of terminating the probation can arise."

We may note in the first place that this decision deals with the character and antecedents prior to the appointment; but the question of eligibility on the ground of age is an entirely different matter. Further, even the report shows that it was open to the authorities to cancel the appointment itself, and that is what was done in the present case by removing the appellant himself.

20. Mrs. Leela Seetharam then cited the decision of the Supreme Court in *State of Orissa* v. *Dr.* (*Miss*) *Binapani Devi and others*[1]. In that case, according to the age given by Binapani Devi, a Doctor, she should have retired only in 1968. But, the department refixed her age and compulsorily retired her with effect from 1963 itself. It is relevant to note that at page 1271, it has been observed—

"The State was undoubtedly not precluded, merely because of the acceptance of the date of birth of the first respondent in the service register, from holding an enquiry if there existed sufficient grounds for holding such enquiry and for re-fixing her date of birth."

This sentence itself shows that similarly in this case it was open to the Department to reopen the question of the date of birth and remove the appellant from service. In that case, there was no proper enquiry. That was the reason why the order of the State compulsorily retiring the officer there was set aside. Here, however, there was a proper enquiry.

21. Mrs. Leela Seetharam then referred to the decision in *Ramavarma Raja* v. *State of Kerala*[2]. There, the order of the department refixing the date of birth of the petitioner was set aside on the ground that there was a pre-determination of the issue without observing the principles of natural justice. But, it was recognised that the department could go into the question of the date of birth by holding a proper enquiry.

22. The next decision, *L. K. Krishnan* v. *State of Madras*[1] was a case where an Assistant Engineer was reduced to the grade of Supervisor on the ground of his having given a false statement as to his qualifications to the Superintending Engineer. That again shows that a false statement about the date of birth can be made a ground for the imposition of the punishment of removal.

23. Thus, the first submission of Mrs. Leela Seetharam that the departmental authority had no jurisdiction because the misrepresentation was before the appointment, is entirely untenable.

24. The second ground on which Mrs. Leela Seetharam urges that the department did not have jurisdiction to dismiss the appellant from service is that under rule 145 of the Indian Railway Establishment Code, the only power of the Department was to correct the date of birth from 20th April, 1929 to 10th May, 1926. Rule 145 (1) says that every person, on entering railway service, shall declare his date of birth which shall not differ from any declaration expressed or implied for any public purpose before entering railway service. Sub-rule (3) says:—

"The date of birth as recorded in accordance with these rules shall be held to be binding and no alteration of such date shall ordinarily be permitted subsequently. It shall, however, be open to the President in the case of a gazetted railway servant, and a General Manager in the case of a non-gazetted railway servant to cause the date of birth to be altered.

(i) Where in his opinion it had been falsely stated by the railway servant to obtain an advantage otherwise inadmissible, provided that such alteration shall not result in the railway servant

1. (1967) 2 S.C.J. 339 : (1967) 2 S.C.R. 625 : A.I.R. 1967 S.C. 1269.
2. (1970) 1 L.L.J. 526 : A.I.R. 1969 Ker. 317.

1. (1972) 1 M.L.J. 1 : 84 L.W. 761.

being retained in service longer than if the alteration had not been made, or ...."

This rule primarily contemplates the railway servant himself seeking to get his date of birth altered. However, we shall assume that the rule enables the departmental authority to correct the age *suo motu*. But, that is not exhaustive of its power in the matter. The rule does not prohibit the department from punishing railway servants for false declaration of age from inflicting even the punishment of removal. If the intention of rule 145 was that it was exhaustive of the power of the departmental authorities when false age is given and would preclude the authorities from taking disciplinary action under the Discipline and Appeal Rules, we would expect such an intention to have been expressed in clear language.

25. The third ground on which the learned counsel for the appellant would urge that the departmental authority had no jurisdiction is that a period of 21 years had elapsed and the principles of laches and equitable estoppel would apply. In our view, there is no scope at all for the application of those principles in a case like this. Those principles can be invoked only by the innocent person and not a guilty person like the appellant who procured his appointment by deceitful means. The subject of laches is dealt with in Halsbury's Laws of England, 3rd Edition, Volume 14, page 641 onwards. At page 643 it is observed that when the equitable remedy is in respect of fraud, there is no laches so long as the party defrauded remains, without any fault of his own, in ignorance of the fraud. It will be seen that in this case the fraud played by the appellant came to light only in 1969 and immediately the departmental authorities took action. The subject of estoppel is dealt with in Halsbury's Laws of England, 3rd Edition, Volume 15 from page 168 onwards. In particular, equitable estoppel is dealt with at page 223. The principleis that an innocent party should have altered his position on the faith of the representation or conduct amounting to representation by the other patry. Here, it cannot be said that the department was aware of the fraud committed earlier than in 1969 and induced any belief in the appellant that no action would be taken against him on that ground.

26. Mrs. Leela Seetharam cited the decision in *Umashankar Misra* v. *Board of High School and Intermediate Education, Uttar Pradesh and others*[1]. That was a case where a college student was declared to have come out successful in the Matriculation examination and subsequently he was allowed to appear for the Intermediate Examination which he passed, and then he studied the B.A. course also. It was held that the University authorities were estopped from contending that he had actually not passed the Matriculation examination. The important point to note is that the allegation made by the University that the student had been guilty of fraudulent misrepresentation was not supported by any evidence. That is what distinguishes that case from the present one.

27. Finally it is urged by Mrs. Leela Seetharam that considering the fact that the appellant had been in service for 21 years and it is not stated that his service was otherwise unsatisfactory, the order, of removal works great hardship. It is, however, settled law that the departmental authorities are the sole judges of what the proper punishment is. For instance, *State of Orissa* v. *Bidya Bushan Mohapitra*[2], and *D.K. Krishnan* v. *State of Madras*[3], may be noted. At the same time, we must observe that we felt considerably distressed that the appellant should have been removed from service though he has put in 21 years of service and his service is not otherwise stated to have been unsatisfactory. There may be other cases of persons who have given false age and have been continuing in service because their misrepresentation has not been detected. Anyway, it is harsh on the appellant. He has a family to support and he would be thrown on the streets by the order of removal. It seems to us that once this Court has by this judgment vindicated the stand of the department

1. A.I.R. 1974 All. 290.
2. (1963) 1 S.C.R. (Supp.) 648: A.I.R. 1963 S.C. 779.
3. (1972) 1 M.L.J. 1 :84 L.W. 761.

that they have got power to remove the appellant from service on account of his having secured the job by false misrepresentation about his age, that would suffice to serve as a precedent on the question of law; and we recommend that on humanitarian grounds and considerations of justice and mercy, the department may take him back, if need be, with some reduction in rank or in emoluments.

28. With this recommendation, the appeal is dimissed, but without costs.

S.J. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*K. Veeraswami, CJ. and S. Natarajan, J.*

Venkatamuniappa Chettiar .. *Appellant**

v.

M. G. R. Lakshminarasimhan and others *Respondents.*

Transfer of Property Act (IV of 1882), section 59-A —Mortgages —Suit to enforce his mortgage by 5th mortgagee —4th defendant who had redeemed the first 4 mortgages claiming priority—Suit dismissed in Second Appeal —Whether correct.

The plaintiff filed the suit to enforce the 5th mortgage in his favour. The 4th defendant claimed priority on the ground that he had redeemed the first four mortgages. The first two Courts decreed the suit and declined to allow the claim of priority by the 4th defendant. On Second Appeal, the suit was dismissed. The plaintiff filed a Letters Patent Appeal.

Held, the 5th mortgagee who is the plaintiff-appellant is entitled to a mortgage decree, but only subject to the first four mortgages in respect of which the 4th defendant would be entitled to the right of subrogation and priority over the appellant. [*Para.* 4.]

* L.P.A. No. 101 of 1975. 28*th January*, 1975.

Case referred to:—

Umed Singh v. *Baburam*, A.I.R. 1924 All. 1035; *Narayan* v. *Parameshvarappa*, A.I.R. 1942 Bom. 98; *Jhum Lal* v. *Sham Narayan*, A.I.R. 1933 Pat. 33; *Gokuldas* v. *Puranmal*, I.L.R. (1884) 10 Cal. 1035; *Guruswamiah* v. *Ramakrishna*, (1964) 2 M.L.J. 448: 78 L.W. 23: A.I.R. 1965 Mad. 142; *Piarey Lal* v. *Dina Nath*, A.I.R. 1939 All. 190.

Petition under clause 15 of the Letters Patent against the decree of the Hon'ble Mr. Justice Venkatadri dated 27th August 1965 and made in S.A. No. 839 of 1963 preferred against the decree of the Court of the Subordinate Judge, Tiruchirappalli in A. S. No. 132 of 1962 (O. S. No. 90 of 1961, District Munsif Court, Karur.)

A. Sundaram Ayyar and *P.S. Srisailam*, for Appellant.

N. Srivatsamani and *A.V. Lakshminarasimhan*, for Respondent.

The Judgment of the Court was delivered by

Veeraswami, CJ.—This appeal under Letters Patent from a judgment of Venkatadri, J., raises an interesting question of law, to wit, whether a transferee from a decree-holder-purchaser in execution of a money decree in his favour of the equity of redemption of a mortgagor is entitled to be subrogated under section 92 of the Transfer of Property Act. The properties in question were subject to five mortgages executed one after the other. The suit out of which the appeal before us by the plaintiff arises, was to enforce the 5th mortgage in his favour. The 4th defendant, who was a transferee from the Court-auction-purchaser of the equity of redemption in execution of the money decree, claimed priority on the ground that he had redeemed the first four mortgages. The first two Courts agreed in decreeing the suit and declined to allow the claim of priority by the 4th defendant. Venkatadri, J., in the Second Appeal was of the view that the 4th defendant could not be regarded as a mortgagor within the meaning of section 59-A, but as a person, who had an interest in the properties, was entitled to redeem the earlier mortgages and as such he coul claimd

subrogation in respect of them under section 92. In taking that view, he followed *Umed Singh* v. *Baburam*[1], *Narayan* v. *Parameshvarappa*[2], and *Jhum Lal* v. *Sham Narayan*[3]. He also made a reference to *Gokuldas* v. *Puranmal*[4], which was, however a case decided prior to the introduction of section 59-A and amendment of sections 91 and 92 in 1929. The learned Judge reversed the decrees of the first two Courts and granted a decree dismissing the appellant's suit.

2. On behalf of the appellant reliance was placed on *Guruswamiah* v. *Ramakrishna*[5]. It seems to us that the present question did not arise there in the precise form, though of course the view in *Piarey Lal* v. *Dina Nath*[6], was followed. We find that there is a direct conflict of view between *Piarey Lal* v. *Dina Nath*[6] and *Umed Singh* v. *Babu Ram*[7], both being decisions of Division Benches and the latter decision taking the view that a person like the 4th defendant here would be entitled to subrogation. On a careful consideration of sections 59-A, 91 and 92, we are inclined to share the view in *Umed Singh* v. *Babu Ram*[7] and *Narayan* v. *Parameshvarappa*[2]. Section 59-A, being an interpretation section, it naturally governs the scope of the term "mortgagor" as applied to the provisions in Chapter IV of the Transfer of Property Act. That section says that unless otherwise expressly provided references in the chapter to mortgagors and mortgagees shall be deemed to include references to persons deriving title from them respectively. A purchaser of equity of redemption from a mortgagor either by private treaty or in execution of a money decree obtained against the mortgagor, will definitely by a person deriving title from the mortgagor. Therefore, the purchaser can also be considered as a mortgagor within the meaning of section 59-A. But the section opens with the words "unless otherwise expressly provided", of which section 68 (1) (*a*) may be an instance. The point is whether there is a provision otherwise made in sections 91 and 92 read together. Section 91 relates to redemption and the category of persons entitled to redeem a mortgage. A mortgagor is one of them. In addition under clause (*a*) of section 91, any person who has any interest in or charge upon the property mortgaged or in or upon the right to redeem the same, will be entitled to redeem. Within this category, may fall a person who was a purchaser of equity of redemption from the mortgagor. But when the section makes a distinction between a mortgagor and a person of the type who may fall within the ambit of clause (*a*) of that section, we have necessarily to read the expression "mortgagor" as any person besides the mortgagor in a restricted manner. In other words, any person who may fall within the ambit of clause (*a*) is not entitled by section 91 to be included within the expression "mortgagor". Interpreting that way, a mortgagor for purposes of section 91 would include a person who has derived title from the mortgagor to the equity of redemption by inheritance or by a will or in any manner otherwise than the means by which any person came to have an interest in the property mortgaged under clause (*a*) of section 91. Either on the ground that section 91 is a provision which provides otherwise as contemplated by section 59-A or on an interpretation of section 91 itself, we are inclined to think that a purchaser of the equity of redemption from the mortgagor either *in invitum* or by private treaty will be a person who has an interest in the property mortgaged within the meaning of clause (*a*), so that he will not be a mortgagor within the meaning of the first part of section 91. If that be so, such a person is not excluded from the right to subrogate under section 92. We are of opinion, therefore, that Venkatadri, J., was right in the view he took.

3. As we said earlier, *Umed Singh* v. *Babu Ram*[1], a decision of Sulaiman, C.J., is directly in point. They held that a

1. A.I.R. 1934 All. 1035.
2. A.I.R. 1942 Bom. 98.
3. A.I.R. 1933 Pat. 33.
4. I.L.R. (1884) 10 Cal. 1035.
5. (1964) 2 M.L.J. 448 : 78 L.W. 23 : I.L.R. (1964) Mad. 1735: A.I.R. 1965 Mad. 142.
6. A.I.R. 1939 All. 190.
7. A.I.R. 1934 All. 1035.

1. A.I.R. 1934 All. 1035.

purchaser of equity of redemption from the original mortgagor was entitled to the benefit of subrogation under section 92, if he redeemed a prior mortgage. Unfortunately, the earlier decision in *Umed Singh* v. *Babu Ram*[1], which was binding was not referred to in *Piarey Lal* v. *Dina Nath*[2]. *Narayan* v. *Parameshvarappa*[3], also decided by a Division Bench followed *Umed Singh* v. *Babu Ram*[1]. We are, with respect, in agreement with the reasoning in *Umed Singh* v. *Babu Ram*[1] and *Narayan* v. *Parameshwarappa*[3] and it is unnecessary to reiterate the same. It follows that on that view, the 4th defendant is entitled to be subrogated to the rights of the first four mortgagees.

4. Venkatadri, J., had dismissed the suit, as we see from his decree. But he was not right in doing so. The 5th mortgagee who is the plaintiff-appellant, was entitled to a mortgage decree, but only subject to the first four mortgages in respect of which the 4th defendant would be entitled to the right of subrogation and priority over the appellant. Subject to this priority declared, we modify the decree of Venkatadri, J. and grant a decree to the appellant on the basis of the 5th mortgage. In the circumstances, we make no order as to costs.

S.J. ——— *Appeal partly allowed.*

1. A.I.R. 1934 All. 1035.
2. A.I.R. 1939 All. 190.
3. A.I.R. 1942 Bom. 98.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*K. Veeraswami, CJ.* and *S. Natarajan, J.*

Swarnathachi .. *Appellant**

v.

The Special Tahsildar, Land Acquisition, K. Atmanatha Iyer .. *Respondent.*

Land Acquisition Act (I of 1894), section 6 (1)—Acquisition of land—Declaration under section 6—Acquisition made by collecting full contribution from the party benefited—Declaration whether valid—Proviso mandatory—Madras Irrigation Works (Construction of Field Bothies) Act, 1959, cannot change this.

The requirement under the proviso to sub-section 1 of section 6 of the Land Acquisition Act is mandatory. Unless a part of the cost of acquisition comes out of public revenues or some fund controlled or managed by a local authority no declaration under section 6 (1) can possibly be made. This is quite clear from the proviso. The Madras Irrigation Works (Construction of Field Bothies) Act, 1959, has nothing to do with this requirement.

[*Para.* 2.]

Case referred to:—

Somawanti v. *State of Punjab*, (1963) 2 S.C.J. 35: (1963) 2 M.L.J. (S.C.) 18: (1963) 2 An.W.R. (S.C.) 18: (1963) 2 S.C.R. 774 ; A.I.R. 1963 S.C. 151.

Petition under Clause 15 of the Letters Patent against the order of the Hon'ble Mr. Justice Ramaprasada Rao, dated 25th July, 1973 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 2672 of 1972 presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records before the 2nd Respondent therein ending with declaration issued under section 6 of the Land Acquisition Act bearing G.O. R. No. 2607 P.W. (Irrigation) dated 15th September, 1972 published in *Fort St. George Gazette* of Supplement Part II S.I. in page 19, dated 27th September, 1972 and quash the said order and made therein.

* W.A. No. 203 of 1973. 3rd *March*, 1975.

Habibullah Badsha and *A. S. Chandrasekaran*, for Appellant.

Government Pleader on behalf of Respondents 1 and 2 and of *V. Kunchitapatham*, for 3rd Respondent.

The Judgment of the Court was delivered by

Veeraswami, C.J.—A small piece of land in Yadayamudayan village, in Pattukkottai Taluk, was acquired by the Government for purposes contemplated by the Madras Irrigation Works (Construction of Field Bothies) Act, 1959. The declaration under section 6 of the Land Acquisition Act was made after completing the enquiry under section 5-A of the said Act. But it turns out that the acquisition was made on the full contribution basis and the entire money for the acquisition was collected from the party who stood to be benefited by the acquisition for purposes of irrigation. The petition under Article 226 of the Constitution, from which the appeal arises, was to quash the land acquisition proceedings on the ground that the proviso to sub-section (1) of section 6 of the Land Acquisition Act had not been complied with; that is to say that no contribution was made from public funds. But the petition was dismissed on the ground that full recovery by the Collector was authorised by the Madras Irrigation Works (Construction of Field Bothies) Act, 1959. Hence this appeal.

2. We are of the view that the requirement under the proviso to sub-section (1) of section 6 of the Land Acquisition Act is mandatory. Unless a part of the cost of the acquisition comes out of public revenues or some fund controlled or managed by a local authority no declaration under section 6 (1) can possibly be made. This is quite clear from the proviso. We do not think that the Madras Irrigation Works (Construction of Field Bothies) Act, 1959 has anything to do with this requirement. That is an independent enactment not related to the acquisition but to the provision for the construction or digging of field bothies by the Government and by owners of lands entitled to irrigation under certain irrigation works in the State of Madras. Merely because it enables the recovery of the entire amount, it does not follow that it *ipso jure* does away with the requirement under the proviso to sub-section (1) of section 6 of the Land Acquisition Act. Since no contribution of any part of the cost was made from the public revenues, the declaration was clearly invalid and has to be quashed.

3. Mr. Habibullah Badsha contends that as a result of the non-compliance with the proviso aforesaid, the entire acquisition proceedings are liable to be quashed and, in support of his contention, he relies on *Somawanti* v. *State of Punjab*[1]. We are unable to accept his contention. In that case the Supreme Court was concerned with the colourable exercise of power. That question would arise only where the purpose for which the acquisition was made was not a public purpose but nevertheless the Government sought to acquire the land in the colourable exercise of power of eminent domain. That is not the case here. The purpose for which the acquisition was made was a public purpose ; on that there can be no question. If there was a colourable exercise of power, learned counsel would be right in contending that the entire land acquisition proceedings should be quashed. In the instant case, as public purpose is present, that will save the notification under section 4 (1) and also the enquiry and report under section 5-A of the Land Acquisition Act. All that goes is the declaration under section 6 (1) of the Act. To that extent the appeal is allowed. No costs.

S.J. ——— *Appeal allowed.*

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1. (1963) 2 S.C.J. 35 : (1963) 2 M.L.J. (S.C.) 18 : (1963) 2 An.W.R. (S.C.) 18 : (1963) 2 S.C.R. 774 : A.I.R. 1963 S.C. 151.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*K. Veeraswami, CJ. and S. Natarajan, J.*

The English Electric Co. of India Ltd. .. *Petitioner**

v.

The Superintendent, Central Excise, Guindy, Mixed Range, Madras and others .. *Respondents.*

Central Excise and Salt Act (I of 1944), *First Schedule, Entry* 23-*B, Constitution of India* (1950), *Article* 226 —*Scope of entry—Mixed question of law and fact within High Court's power to deal with—High Rupturing Capacity Cartridge Juselinks—Whether attracts excise duty under Entry* 23-*B.*

The scope of an Entry in the First Schedule to the Central Excise and Salt Act, 1944 is always a question of law, and whether it applies to a given article is also a mixed question of law and fact, and such a question is therefore, within the power of the High Court under Article 226 of the Constitution to deal with.

[*Para.* 2.]

The whole thing, namely, the High Rupturing Capacity Cartridge Fuselink, is a manufactured article and one of its components is porcelain. But merely because that component forms part of the finished article cannot by itself make it come within Entry 23-B (of the First Schedule to Central Excise and Salt Act), for it must be a porcelainware as such. Hardly High Rupturing Capacity Cartridge Fuselink can be described as a porcelainware as we commonly understand the phrase. The High Rupturing Capacity Cartridge Fuselink in this case will not be liable to excise duty under entry 23-B. [*Paras.* 4 and 5.]

Cases referred to :—

Girdharial v. *Union of India,* (1965) 1 S.C.J. 225 : (1964) 7 S.C.R. 62 : A.I.R. 1964 S.C. 1519; *Union of India* v. *Delhi Cloth and General Mills,* A.I.R. 1963 S.C. 791.

* W.P. No. 343 of 1974. 12*th February,* 1975.

Petition under Article 226 of the Constitution for the issue of a writ of *certiorari* calling for records and quashing the order in O. C. No. 6325 of 1973 of the respondent etc.

Uthama Reddi, for Petitioner.

R. Thiagarajan, for the Senior Standing Counsel, for Central Government for Respondents.

The Order of the Court was made by

Veeraswami, C J.—This petition raises an interesting question as to the scope of Entry 23-B in the first Schedule to the Central Excise and Salt Act, 1944. The petitioner, the English Electric Co. of India Ltd., engages itself in manufacturing equipment useful in the distribution of electricity at its works at Pallavaram near Madras. One of the items of manufacture is High Rupturing Capacity Cartridge Fuselinks. The question is whether this will attract excise duty under the Entry. For the year 1968, the Revenue after consulting the Chemical Examiner, concluded that the particular High Rupturing Capacity Cartridge Fuselinks would not fall within the scope of Entry 23-B. But, on 7th November, 1973 the Superintendent of Central Excise, Guindy Mixed Range, notified the petitioner that in view of the revised opinion expressed by the Chemical Examiner, the article would attract excise duty. A part of the Chemical Examiner's report was cited in that communication. It said that the sample was in the form of the white hollow cylindrical piece having rough surface, that when written on by ink. the ink markings could not be easily rubbed off showing the sample was not glazed, that on breaking the sample, the broken surface was found to be rough and no pores were visible to the eye, that water absorption was found to be 0.37% and that it was composed of compounds of aluminium, calcium, magnesium, iron and silicon. The report, therefore, concluded by saying that the article could be considered as porcelainware. This conclusion is resisted by the petitioner.

2. For the Revenue our attention was invited to *Girdharlal* v. *Union of India*[1],

1. (1965) 1 S.C.J. 225 : (1964) 7 S.C.R. 62 : A.I.R. 1964 S.C. 1519.

in support of the contention that, since this Court under Article 226 of the Constitution of India, was not sitting in appeal over the decision of the Excise authorities the correctness of the conclusion reached by such authorities on the appreciation of the item in the Central Excise and Salt Act, 1944, was not a matter which would fall within the writ jurisdiction of this Court. We are unable to accept the contention. The Supreme Court there was dealing with a different situation in relation to the facts of that case, and we do not think that it applies to the case before us. The scope of an Entry in the First Schedule to the Central Excise and Salt Act, 1944 is always a question of law, and whether it applies to a given article is also a mixed question of law and fact, and such a question is therefore, within the power of the High Court under Article 226 of the Constitution to deal with.

3. The petitioner contends that the article before us is not porcelain, which according to him, normally contains 50% China Clay, 25% Quartz and 25% Feldspar. Because the article in question does not conform to that composition, but contains 28% of Steatite and 20% of Zircon Silicate and also absorption capacity of 0.37% it need not necessarily be regarded as porcelain. The Entry reads :

"23-B Chinaware and Porcelainware —All sorts —(1) Tableware, (2) Sanitaryware (3) Glazed tiles (4) Not otherwise specified."

The *Explanation* to the Entry says that 'Chinaware' includes all glazed clayware, but does not include terracotta. But we are not concerned with this in this case. 'Porcelain' is defined in several publications. Indian Standard Glossary of Terms relating to Ceramic ware defines porcelain as a glazed or unglazed ceramic white ware having not more than 0.3% water absorption. The Shorter Oxford English Dictionary gives the meaning of the word 'procelain as a fine kind of earthernware, having a translucent body and a transparent glaze, or anything made of this. The publications are all agreed that porcelain normally contains China clay, Quartz and Feldspar. But they show that the proportion which the petitioner mentioned is not always a crucial test ; nor even the thermal expansion capacity or the capacity of absorption which according to the books, seems to vary between 0.5% and 0.3%. Merely because Zircon Silicate to the extent of 20% and Steatite to the extent of 28% form omponents of what is normally called porcelain the produce does not cease to be porcelain. For instance 'Ceramics in the Modern World' by Maurice Chandler states that in steatite ceramics, a high proportion of steatite (a natural crystalline form of magnesium silicate, or talc) is mixed with far smaller proportions of clay and some flux or fluxes other than the usual ceramic flux, fieldspar. It is also pointed out that feldspar is excluded, because it contains the oxides of sodium and potassium, the alkalis that are responsible for the rather high dielectric loss or ordinary porcelain. The flux that normally replaces it is barium carbonate, though magnesium carbonate is sometimes used instead. We also find it stated in this book that another of the two important low-loss ceramics, developed since World War II, is zircon porcelain, a kind of porcelain, in which quartz is replaced by zirconium silicate and feldspar by alkali-free fluxes. In the Introduction to Technical Ceramics, Waye points out that talc another source of Mg°. and commonly used in other branches of the industry is an important constituent of cordicrite and steatite ceramics. Steatite is properly the massive form of talc but the term has come to be used also for ceramics made mainly from talc. Talc was formed by the hydration of magnesium-bearing rocks under pressure and occurs in various parts of the world; the main sources for use in England are Egypt and India. Reference is also made in this book to Zirconium compounds which occur in alluvial sands in Ceylon, Madagascar and Australia. This form of porcelain is used in electroceramics and it is the major constituent of zircon porcelain. Under the topic 'Ceramic Compositions' it appears as seen from this book there are two types of steatite ceramics normal and low-loss ; the former is fluxed with feldspur and the latter with alkaline earths which give higher Te values.

Small amounts of other materials may be added *e.g.* Mg. C.03 ; and also Zr O 2 and alkaline earth Zironium silicates are claimed to improve thermal shock resistance although this is not often required. The clay assists in plastic shaping and also in fluxing. The content may be increased and decreased according to whether plastic shaping or dry pressing is to be used. So far as translucency as a property of porcelain is concerned it does not seem that it is an essential requisite of an article to be porcelain. We have examined some of the other definitions of the term. In 1970 Annual Book of A. S. T. M. Standards porcelain is said to be a glazed or unglazed vitreous ceramic whiteware used for technical purposes. It is also said that the term designates such products as electrical, chemical, mechanical, structural and thermal wares when they are vitreous. Waye in his Introduction to Technical Ceramics points out that the properties required in electrical porcelain are somewhat different from those for domesticware—translucency and whiteness are less important; mechanical and electrical properties are more important. In 1970 Annual Book of A. S. T. M. Standards we find that the extent of absorption may also vary and need not necessarily be fixed but within certain maximums. The term 'vitreous' generally signifies less than 0.5 per cent. absorption except for floor and wall-tile and low-voltage electrical porcelain which are considered vitreous upto 3.0 per cent. water absorption. 'Vitrification' itself signifies progressive reduction in porosity of a ceramic composition as a result of heat treatment, or the process involved. So then, the net result of these publications is that while porcelain may have as its components kaolin-Chinaclay, feldspar, which contains silicon and calcium and quartz, which is mainly silicon, the variation in the proportions of each of these main elements, subject to limitations will not alter the character of the product as porcelain. The proportion may vary depending on the different objectives for which the product may be used. We are, therefore, inclined to think that the variations in the proportion or the quality of porcelain in the matter of thermal expansion and pressure of translucency or composition will not alter the character of the article as porcelain. But this result will not conclude against the petitioner.

4. The further contention is that since, Entry 23-B speaks of chinaware and porcelainware, all sorts, the article in question cannot be regarded as a porcelainware. 'Ware' according to the Shorter Oxford English Dictionary means articles of merchandise or manufacture ; the things which a merchant, tradesman or pedlar has to sell ; goods, commodities. Mr. Uthama Reddi for the petitioner draws our attention to *Union of India* v. *Delhi Cloth and General Mills*[1] and contends that porcelain which is a component only of High Rupturing Capacity Fuselinks cannot be regarded as goods within the meaning of 'excisable goods' under the Act. Section 3 is the charging section, which says that there shall be levied and collected in such manner as may be prescribed duties of excise on all excisable goods other than salt which are produced or manufactured in India and a duty on salt manufactured in, or imported by land into, any part of India as, and at the rates, set forth in the First Schedule. 'Excisable goods', as defined in section 2 (*d*), means goods specified in the First Schedule as being subject to a duty of excise and includes salt. In *Union of India* v. *Delhi Cloth and General Mills*[1] it was held that goods for purposes of Central Excise and Salt Act, having regard to the definition of 'excisable goods' and the charging section would refer to an article which could ordinarily come to the market to be brought and sold. The petitioner says that the porcelain component of the High Repturing Capacity Fuselinks is not by itself marketable as it is designed only to serve as a component of such fuselinks. But in the same decision, the Supreme Court pointed out that the fact that the substance produced by the manufacturer at an intermediate stage was not put in the market would not make any difference to the chargeability of the

1. A.I.R. 1963 S.C. 791.

substance to excise duty if it is covered by an item in Schedule I of the Act. The question, therefore, would be whether High Repturing Capacity Fuselinks would fall within the ambit of Entry 23-B in the first Schedule to the Act. No doubt, the heading of the Entry covered porcelainware of all sorts. If we stop there, there is no difficulty in stating that any kind of procelainware will fall within the Entry. But then, when one looks into the itemisation of articles in the Entry, doubt arises whether an article like High Repturing Capacity Fuselinks will be within the ambit of the Entry. The enumeration of the articles consists of tableware, sanitaryware, and glazed tiles. Fuselink of the type we have here has no possible analogy at all to any of the things mentioned there. It is no doubt true that the fourth item of Entry 23-B is 'not otherwise specified' and this phraselogy 'read with all sorts' may perhaps justify a contention that porcelain of all sorts, although not 'tableware, sanitaryware and glazed tiles' will fall within the scope of Entry 23-B. But the pointed argument of Mr. Uthama Reddi, before us is that High Repturing Capacity Fuselink as such is not and cannot bedescribed as porcelain ware. We have already noted the meaning of the word 'ware' and this word 'ware' occurs as part of tableware, sanitary ware and glazed tiles. To our minds, it is difficult to regard High Repturing Capacity Fuselink as porcelainware merely because one of its components is made of porcelain. The whole thing, namely, High Repturing Capacity Fuselink, is a manufactured article and one of its components is porcelain. But merely because that component forms part of the finished article, we cannot take it that that by itself will come within Entry 23-B, for, it must be a porcelainware as such. Hardly, High Repturing Capacity Fuselink can be described as a porcelainware as we commonly understand the phrase. That the Legislature is familiar with a fuselink like the one we have before us is clear from the fact that in Item No. 73 (1) of the First Schedule to the Indian Tariff Act, 1934, the article is described as follows :—

"Electrical Control Gear and Transmission Gear, namely, switches—(excluding switch boards), fuses and Current breaking devices of all sorts and descriptions, designed for use in circuits of less than ten amperes and at a pressure not exceeding 250 volts."

This is an article which will fall possibly under that Entry 73 (1). By no stretch of imagination, we can say that merely because an article described under entry 73 (1) contains, as a component, a piece of porcelain, it becomes a porcelainware for purposes of that entry. No less can it become porcelainware for purposes of Entry 23-B in the first Schedule to the Central Excise and Salt Act, 1944.

5. We are, therefore, of opinion that High Repturing Capacity Fuselink in this case will not be liable to excise duty under Entry 23-B. The petition is allowed with costs. Counsel's fee Rs. 250.

S.J. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*M. M. Ismail, J.*

N. E. Vedammal .. *Appellant**

v.

S R. Krishnamoorthy Iyer .. *Respondent.*

Adverse possession—Suit for declaration and possession—Land—Trespasser selling —Suit by owner—Decree passed in favour of owner—Purchaser claiming title by adverse possession—Pendency of suit before the culmination of title by adverse possession—Purchaser's claim whether valid.

R trespassed upon the property of *X* and sold it to *V*. *X* filed a suit against *R* and *V* for declaration of title and possession of the property. The said suit was filed before *V* could perfect her title by adverse possession. The suit was decreed in favour of *X* subsequently the suit property was acquired by Government. *V* claimed compensation as against *X* on the ground that she had title by adverse possession.

* Appeal No. 237 of 1970. 25th *March*, 1975.

Held, the period from the institution of the suit upto the date of the judgment and decree had necessarily to be ignored as the institution of the suit had destroyed the previously existing adverse possession or suspended it from that date. *V* had not acquired title to the suit property by adverse possession and cannot claim the compensation

[*Paras*. 12 *and* 15.]

Cases referred to:—

Singaravelu Mudaliar v. *Chokka Mudaliar alias Chokkalinga Mudaliar* 16 L.W. 544 : 43 M.L.J. 737 : I.L.R. 46 Mad. 525 : A.I.R. 1923 Mad. 88 (2); *Achiman Bibi* v. *Abdul Rahim Nasker*, A.I.R. 1958 Cal. 437; *Ratna Bai alias Hira Bai* v. *The Official Assignee of Madras*, (1915) 29 I.C. 167 : (1915) P.L.R. 75; *Ragho Prasad* v. *Pratap Narain Agarwal*, (1969) All.L.J. 975 ; *Dagadaboi Fakirmahomad* v. *Sakharam Gavaji*, A.I.R. 1948 Bom. 149 ; *Fatima Bibi* v. *Hajee Muhammad Usman Sahib*, 56 L.W. 132 : I.L.R. (1943) Mad. 696 : (1943) 1 M.L.J. 212: A.I.R. 1943 Mad. 425; *Lala Nand Lal* v. *Sundar Lal*, A.I.R. 1944 All. 17.

Appeal against the decree of the VIIIth Asst. Judge, City Civil Court, Madras dated 1st November, 1969 and made in L.A.C. No. 118 of 1967.

R. Deenadayalu and *P. Nagasundararajan* for Appellant.

V. Natesan and *B. Motilal Jain*, for Respondent.

The Court delivered the following

JUDGMENT.—The second claimant in L.A.C. No. 118 of 1967 on the file of the City Civil Court, Madras is the appellant herein. The said land acquisition case is a reference under sections 30 and 31 of the Land Acquisition Act made to the Court in respect of the compensation awarded for certain lands acquired by the Government. Having regard to the nature of the controversy between the parties, it is unnecessary to refer to the land acquisition proceedings themselves in detail.

2. The case of the first claimant, who is the first respondent herein, was that the entire block of land of 6-15 acres belonged to him, the same having been purchased by his father-in-law in the Court-auction held in O. S. No. 525 of 1936 on the file of the Court of the District Munsif of Poonamallee, benami for him and taken possession of as early as 1941 ; that while so, one Rajagopala Pillai claiming some right in the said property, trespassed into the same and started making some alienations to various persons who also began to trespass into the property ; that thereupon the first claimant and his father-in-law, filed C.S. No. 56 of 1951 on the file of this Court, which was later on transferred to the City Civil Court, Madras, and numbered as O. S. No. 1162 of 1955, against the said Rajagopala Pillai and other trespassers in possession in a representative character ; that the said suit after contest was decreed in favour of the first claimant directing possession of the said lands with mesne profits past and future to be delivered to the first claimant and his father-in-law; that 11 persons filed an appeal in C. C. C. A. No. 51 of 1957 on the file of this Court in which a conditional decree by consent was passed in favour of those appellants declaring their rights to the properties in their possession on their paying to the first claimant the value of the said properties, as taxed in that decree ; that subject to that condition and modification, the decree of the trial Court was confirmed against the other defendants and it had become final against them ; that the claim of the appellant that she had purchased the acquired properties from one Rajagopala Pillai was not true and the same was rejected in those proceedings ; that the first claimant filed E. P. No. 381 of 1962 for taking possession from the appellant herein ; that when the bailiff went to deliver possession, she set up three obstructors to resist the delivery ; that the first claimant filed E.A. No. 800 of 1963 for removal of obstructions which was ordered ; that after all these proceedings the appellant was coming forward to claim the compensation to which she was not entitled ; and that therefore the first claimant prayed that the entire amount of compensation might be paid to him, as he alone was entitled to the same,

3. The case of the appellant was that she purchased the acquired property, that is, one ground and 1200 sq. ft. from Rajagopala Pillai under Exhibit A-1, sale deed datd 2rd March, 1950 for a consideration of Rs. 1,300, that she had been in possession and enjoyment of the same since then upto the date on which the Government acquired the same ; that she allowed some persons to occupy some huts put up by her in the said plot at her own cost and she had been collecting rents from them ; that later on the appellant brought the 3rd claimant who is a close relation of her and permitted him to put up a hut ; that the third claimant was there as a lessee by putting up the superstructure ; and that the compensation of Rs. 500 might be paid to the third claimant; that her vendor (?) appeared to have realised a major portion of his dues from several other purchasers from his mortgage. The appellant prayed for marshalling the security and also stated that the first claimant can claim only a proportionate part according to the respective extents of plots held by the various purchasers. She also contended that she did not admit the ownership of the first claimant.

4. The third claimant contended that he was looking after the acquired property of the appellant and that with her permission he put up the structure at a cost of Rs. 1,000. He prayed that a sum of Rs. 1,200 for the superstructure and a sum of Rs. 500 for the well dug by him might be paid to him.

5. Under these circumstances, the question for consideration before the learned trial Judge was whether the first claimant was entitled to the entire compensation amount for the lands acquired or whether it was the second claimant-appellant who was entitled to the compensation in the present case.

6. The learned VIIIth Assistant Judge, City Civil Court, Madras, by his judgment and decree dated 1st November, 1969 held that it was the first claimant who was entitled to the entire compensation for the lands acquired and decreed accordingly. It is against this judgment and decree that the present appeal has been filed by the second claimant.

7. Exhibit A-2 dated 26th July, 1956 is a certified copy of the judgment in O.S.No.1162 of 1955 on the file of the City Civil Court, Madras. Exhibit 3 dated 26th July, 1956 is a certified copy of the decree therein and Exhibit A-4 dated 23rd September, 1960 is a certified copy of the decree in C.C.C.A.No. 51 of 1967 on the file of this Court. Exhibit A-2 clearly shows that the appellant herein was the 26th defendant in that suit, O.S.No.1162 of 1955. Exhibit A-4 shows that except to the extent of compromise arrived at between the appellants and the respondents therein the appeal was dismissed as against the other respondents, and the consequence is that the decree for declaration of title and recovery of possession passed in O.S.No. 1162 of 1955 was confirmed as far as the present appellant is concerned. Rajagopala Pillai, the alleged vendor of the appellant, was the first defendant in O.S.No.1162 of 1955. Since the judgment in that case negatived the title of Rajagopala Pillai, the learned counsel for the appellant proceeded on the basis that the appellant herein perfected title to the suit property by adverse possession. Therefore, the question for consideration is, whether the appellant has established that case.

8. The learned trial Judge was not sure whether the appellant was in possession of the property at all. He held that even assuming that she was in possession, the suit O.S.No.1162 of 1955 and the decree passed therein, to which she was a party interrupted holding (?) the property by adverse possession. Even according to the appellant, she came into possession of the suit property under Exhibit B-1 dated 2nd March, 1950 and therefore her possession must have commenced only thereafter. As I have pointed out already, the decree in O.S.No.1162 of 1955 is dated 26th July, 1956. Consequently, neither at the time of the passing of the decree therein, the appellant had perfected her title by adverse possession. The argument of the learned counsel for the appellant is that notwithstanding the decree passed in O.S.No. 1162 of 1955 and the order directing the removal of obstruction in E.A.No.800 of 1963, as evidenced by Exhibit A-9 dated 18th

February, 1963 the appellant continued to be in possession of the property till the same was taken possession of by the Government in 1966 and that therefore she had acquired title to the property by adverse possession. This case was, rejected by the trial Court and I am of the opinion that it was rightly rejected.

9. The learned counsel for the appellant placed great reliance on a decision of this Court in *Singaravelu Mudaliar* v *Chokka Mudaliar* alias *Chokkalinga Mudaliar*[1]. That was a case where the defendant who was in possession of the property continued to be in possession of the property even after the suit for declaration of title was decreed and was not dispossessed and therefore this Court took the view that the defendant had acquired title by, adverse possession. The learned counsel for the appellant relied upon some observations contained in that judgment and contended that there was no difference between a suit for a mere declaration and a suit for declaration and recovery of possession and that even if a suit for declaration and recovery of possession was decreed, the defendant would acquire title by adverse possession if he was not dispossessed within 12 years, pursuant to the decree passed therein. I am unable to accept this argument. The learned counsel for the appellant concedes that the decision of this Court referred to above did not deal with a case where a suit for declaration of title and recovery of possession was instituted and decreed and dealt with a case which involved merely a suit for declaration of title. However a Bench of the Calcutta High Court has considered this decision and observed in *Achiman Bibi* v. *Abdul Rahim Nasker and others*[2], as follows :

> " We hold that there is considerable difference between a suit for mere declaration and a suit for declaration coupled with a prayer for possession. It is true that by a decree for declaration without more the position of a person in wrongful occupation will not be disturbed even if the decree be passed in his presence. If such person continues in possession even after the declaratory decree, he may, nevertheless, acquire prescriptive title. The consequences are different, if the suit for declaration is coupled with a claim for possession, as was done in the present case, and such suit is decreed. ".

The view of the learned Judge was that if a suit for declaration coupled with a claim for possession is filed and such suit is decreed in the presence of the person in wrongful occupation, the decree arrests the running of time against the true owner and that if the person in wrongful possession continues in possession even after the decree, the wrongful possession does not ripen into prescriptive title by efflux of time. The learned Judges referred to the decision of this Court mentioned by me above and distinguished the same on the ground that that case involved only a suit for declaration and not a suit for declaration coupled with a prayer for recovery of possession.

10. A similar argument was considered by a Bench of the Allahabad High Court in *Ragho Prasad* v. *Pratap Narain Agarwal*[1]. The learned Judges considered a suit for partition and recovery of possession of the plaintiff's share therein and held :

> " The suit in the instant case was not a suit for declaration, it was a suit for partition and possession. In a suit such as this, it is not possible to hold that if the defendant has been in adverse possession before the institution of the suit scuh adverse possession continues to run even after the institution of the suit so as to prescribe a good title in favour of the defendant. Were that so it could result in the frustration of the suit because while it was pending and before it terminated in a decree the defendant could have acquired title by adverse possession. Such a result is wholly unwarranted in law ".

Let us test the proposition of the learned counsel for the appellant from a practical point of view. Suppose a person is in wrongful possession of the property and after he has been in such wrongful posses-

1. 16 L.W. 544 : 43 M.L.J. 737 : I.L.R. 46 Mad. 525 : A.I.R. 1923 Mad. 88 (2).
2. A.I.R. 1958 Cal. 437.

1. (1969) All.L.J. 975.

sion for three years, the real owner files a suit for declaration of title and recovery of possession. Assume that for some, reason or other the suit was pending for nearly 9 years before the Court and after 12 years from the commencement of the possession of the defendant (person in wrongful possession) the suit was decreed. Can it be held that since the decree itself was passed 12 years after the adverse possession commenced the defendant had perfected title to the suit property by adverse possession and therefore acquired a good title and the decree-holder cannot thereafter execute the decree and recover possession of the property? That merely emphasises the fact that when a suit for declaration of title and recovery of possession is instituted before the adverse possession has culminated in the acquisition of prescriptive title the time during which the suit is pending cannot be taken advantage of by the person in wrongful possession and tacked on to the period during which he was in possession before the institution of the suit for the purpose of claiming prescriptive title.

11. In fact, the above view is well supported by authority. In *Ratna Bai* alias *Hira Bai and others* v. *The Official Assignee of Madras and another*[1], Sadasiva Aiyar, J., stated :

> "Now it is clear law in an ordinary suit if *A* sues on a good title for possession of his land after 11 years of dispossession, even if the defendant continued is possession for another 12 years during the pendency of litigation and before the suit became finally ripe for decision, judgment ought to be given for possession in plaintiff's favour the continuance of the defendant's possession for 12 years during the pendency of the suit being wholly ignored."

A Bench of this Court in *Fatima Bibi and another* v. *A. Hajee Muhammad Usman Sahib*[2], dealing with a suit instituted under Order 21, rule 63, Civil Procedure Code, held that the institution of the suit arrests the running of time in favour of defendant.

1. (1915) 29 I.C. 167 : (1915) P.L.R. 75.
2. I.L.R. (1943) Mad. 696 : (1943) 1 M.L.J. 212 ; 56 L.W. 132 : A.I.R. 1943 Mad. 425.

12. A Bench of the Allahabad High Court in *Lala Nand Lal* v. *Sundar Lal and others*[1], pointed out:

> "The effect of the institution of a suit within limitation is to destroy previously existing adverse possession with effect from the date of institution or at any rate to suspend it from that date until the suit is finally decided one way or the other."

I have already pointed out that the adverse possession, if any, of the appellant herein commenced only on or after 2nd March, 1950, when she purported to purchase, the property from one Rajagopala Pillai under Exhibits B-1 and C.S.No. 56 of 1951 (which was later transferred to the City Civil Court, Madras, and numbered as O.S.No. 1162 of 1955) was instituted the very next year and the judgment in that suit was pronounced on 26th July, 1966 as evidenced by Exhibit A-2. Consequently, the period from the institution of the suit upto the date of the judgment and decree has necessarily to be ignored in the language of this Court in *Ratna Bai* alias *Hira Bai and others* v. *The Official Assignee of Madras and another*[2], referred to above or the institution of the suit has destroyed the previously existing adverse possession or suspended it from that date; in the language of the Allahabad High Court in *Lala Nand Lal* v. *Sunder Lal and others*[2], referred to already, and as possession was taken by the Government pursuant to the acquisition of the land under the provisions of the Land Acquisition Act only in 1966, the appellant cannot be held to have prescribed title to the property by adverse possession.

13. The learned counsel for the appellant placed great reliance on a judgment of the Bombay High Court in *Dagadabai Fakirmahomad* v. *Sakharam Gavaji and others*[3]. The head-note of the decision states :

> "Whether a decree for possession in favour of the plaintiff does or does not interrupt adverse possession is purely a question of fact to be decided on the

1. A.I.R. 1944 All. 17.
2. (1915) 29 I.C. 167 : (1915) P.L.R. 75.
3. A.I.R. 1948 Bom. 149.

circumstances of each case. If the decree, does not in fact result in the defendant giving up possession of the property or having possession of the property taken from him, it cannot be said that it has interrupted possession. nor can it in law affect the nature of the possession, unless it does so in fact; A decree for possession followed by an unsuccessful execution cannot be deemed as a matter of law to have the effect of either interrupting possession or altering its character."

With regard to the facts, the head-note itself points out:

> "The plaintiff mortgaged certain lands and the mortgagee obtained a decree which provided that the mortgagee should have possession of the lands for two years and the possession should thereafter go to the plaintiff. The mortgagee attempted to execute the decree but could not get possession from the defendants who were in possession as heirs of the husband of the plaintiff. The possession was never in fact obtained by anybody. The plaintiff then brought a suit against the defendants claiming as an heir of her husband to eject the defendants. The defendants set up adverse possession. The question was whether possession was interrupted by the mortgage decree :
>
> *Held*, that the possession of the defendant must, on the facts, be deemed to have been adverse throughout and could not be said to have been interrupted by the mortgage decree."

I am of the opinion that on the facts this case is distinguishable. Apart from that, the High Court of Bombay did not consider the distinction between a suit for declaration of title and a suit for declaration coupled with a prayer for recovery of possession, which was subsequently decreed, but instituted at the time when the defendant in possession had not perfected his title by adverse possession. In view of this, I am unable to hold that the said decision is helpful to the appellant in the present case. In any event on the basis of the decisions referred to above, if the time during which the suit instituted by the first respondent herein for declaration of title and recovery of possession was pending is excluded, the question of the appellant acquiring title by adverse possession does not arise.

14. I also gave time to the counsel for the appellant yesterday to produce any authority of this Court to show that this Court has dealt with a case where a suit for declaration of title and recovery of possession has been decreed and still it was held that the defendant's possession was uninterrupted in spite of that decree. The learned counsel frankly represented to me today that he is not able to lay his hands on any authority excepting the decision in *Singaravelu Mudaliar* v. *Chokka Mudaliar* alias *Chockkalinga Mudaliar*[1], referred to already. Under these circumstances, I prefer to follow the decision of the Calcutta High Court referred to above namely *Achiman Bibi* v. *Abdul Rahim Naskar and others*[2], laying down the principle mentioned by me above and distinguishing the decision of this Court in *Singaravelu Mudaliar* v. *Chokka Mudaliar* alias *Chokkalinga Mudaliar*[1], referred to above.

15. Consequently, it must be held that the appellant has not acquired title to the suit property by adverse possession. Since I have come to the conclusion that the appellant has not acquired title to the property by adverse possession, it is unnecessary to consider the question whether the appellant was actually in possession of the property at all, because even if she was in actual possession of the property. I have held that she has not acquired title to the same by adverse possession.

16. Under these circumstances, the appeal fails and is dismissed with costs of the first respondent.

S.J. *Appeal dismissed.*

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1. 16 L.W. 544 : 43 M.L.J. 737 : A.I.R. 1923 Mad. 88.
2. A.I.R. 1958 Cal. 437.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*K. Veeraswami CJ.* and *S. Natarajan, J.*

Pettai Co-operative Milk Supply Ltd., represented by its President, R. Balakrishnan .. *Appellant**

v.

The Presiding Officer, Labour Court, Madurai and another .. *Respondents.*

Industrial Disputes Act (XIV of 1947), section 33-C (2)—*Payment of Gratuity Act (XXXIX of* 1972), *section* 14—*Employee—Resignation —Application under Industrial Disputes Act to Presiding Officer, Labour Court for determining gratuity payable—Application whether made to proper forum—Section* 14 *of Gratuity Act whether excludes section* 33-*C*(2) *of Industrial Disputes Act—Scope of section* 33-*C* (2) *of Industrial Disputes Act.*

The employee of an organisation resigned and applied to the Presiding Officer, Labour Court under section 33-C (2) of the Industrial Disputes Act, 1947. The employer did not dispute the entitlement of the employee to gratuity. But the employer contended that the application had not been filed before the proper Court. According to the employer, the Payment of Gratuity Act, 1972 excluded the operation of section 33-C (2) of the Industrial Disputes Act, 1947.

Held, Section 33-C (2) of the Industrial Disputes Act, 1947 is of a general character and has wider application and is not excluded by section 14 of the Gratuity Act, so far as this case is concerned. [*Para.* 5.]

Appeal under Clause 15 of the Letters Patent against the order of Ismail, J., dated 5th December, 1973, and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 6321 of 1973 presented under Article 226 of the Constitution of India to issue a writ of *certiorari*, calling for the records relating to the order of the 1st respondent dated 29th August, 1973 in Claim Petition No. 173 of 1973 and quash the same in so far as it relates to that portion of the order by which a sum of Rs. 682-50 has been directed to be paid as gratuity to the second respondent.

P. Chidambaram, for Appellant.

Sanjay Mohan, for Respondents.

The Judgment of the Court was delivered by

Veeraswami, CJ.—This appeal is from an order of Ismail, J. The learned Judge dismissed the appellant's petition on the ground that the question as to whether the Labour Court had no jurisdiction to direct payment of gratuity to the second respondent after the enactment of the Payment of Gratuity Act, 1972, was not raised before the Labour Court.

2. The second respondent was an employee of the appellant. He resigned with effect from 26th December, 1972. He claimed gratuity at a particular rate and asked the Presiding Officer, Labour Court, Madurai, to compute it in terms of money under section 33-C (2) of the Industrial Disputes Act, 1947. A cryptic counter-statement was filed by the appellant. All that was stated there was this :

> "This respondent submits that this Court has no jurisdiction to entertain this petition. The petitioner ought to have filed this petition before the proper Court. On this ground alone, this petition should be dismissed."

It may be noted that in the counter statement there was no denial of the entitlement of the employee to gratuity. That being the case, there being no dispute as to entitlement raised before the Presiding Officer, Labour Court, he has jurisdiction to compute in terms of money the gratuity which the second respondent claimed. Apart from the fact that the question raised before Ismail, J., was somewhat different and we agree with the learned Judge on his conclusion, it is contended before us that the Payment of Gratuity Act, 1972, contains provisions which establish that the Act is a comprehensive one, that it deals with a right not existing in common law and that when it created a right, made provisions for its recognition, provided machinery for deter-

* W.A. No. 55 of 1974. 19*th March*, 1975.

mination of gratuity, a procedure therefor and also to decide disputes where a claim to gratuity was denied, the general jurisdiction under section 33-C (2) of the Industrial Disputes Act should necessarily to be taken to be excluded. We are afraid that the proposition so put is too broad. We are here concerned with a case where, before the Presiding Officer, Labour Court, a claim for computation in terms of money in respect of gratuity, entitlement to which there was no dispute, was made ; whether in such a case the jurisdiction under section 33-C (2) of the Industrial Disputes Act is excluded is the question here.

3. The Payment of Gratuity Act was enacted to provide for a scheme for the payment of gratuity to employees engaged in certain industries, shops and establishments and for matters connected therewith or incidental thereto section 4 directs that gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years, and in certain other contingencies. How the gratuity should be computed is also provided by the section. We find further provisions in this section as to when gratuity can be denied. Section 7 relates to determination of the amount of gratuity. It says that a person eligible for payment of gratuity under the Act shall apply to the employer within the prescribed time for payment of gratuity and that the employer, whether such an application has been made or not shall determine the amount of gratuity and notify the employee as well as the Controller specifying the amount determined and payable as gratuity. Thereafter, the employer shall arrange to pay the amount of gratuity within the prescribed time to the employee or the person entitled thereto in his stead. We have then sub-section (4) (*a*) of section 7, which is material, and it reads :

> "If there is any dispute as to the amount of gratuity payable to an employee under this Act or as to the admissibility of a claim of, or in relation to an employee for payment of gratuity, or as to the person, entitled to receive the gratuity the employer shall deposit with the controlling authority such amount as he admits to be payable by him as gratuity."

Under clause (*b*) the controlling authority is vested with jurisdiction to decide the dispute in the manner laid down. Recovery of gratuity is provided by section 8 by the process of issuing a certificate for the amount due as gratuity to the Collector, who shall recover the amount and interest, as if they were arrears of land revenue and pay the realisation to the person entitled. We have then the penalty section, cognisance of offences and related provisions. Section 14 gives the Act an overriding effect. It states that the provisions of the Act or any Rule made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument or contract having effect by virtue of any enactment other than this Act. We may observe that the overriding effect comes into play when any provision in the Payment of Gratuity Act is inconsistent with any provision in any other Act. In exercise of the rule-making power under section 15, rules have been made, which generally deal with the procedure in dealing with applications for gratuity. There is nothing in these rules which bears on the question of jurisdiction of the Controller and the Presiding Officer under the Gratuity Act, as we may call it, and under section 33-C (2) of the Industrial Disputes Act.

4. In dealing with this matter, we should first observe that though the Presiding Officer's jurisdiction was denied, no dispute was at all raised in the counter statement before the Presiding Officer as to the entitlement of the employee to gratuity. Section 33-C (2) of the Industrial Disputes Act provides for a general jurisdiction for computation in terms of money any benefit which the workman can be entitled to. It is not denied that gratuity can well be the subject-mater of an industrial dispute in which case, section 33-C (2) of the Industrial Disputes Act would be applicable. It has been held by this Court and the Supreme

Court in decided cases that sub-section (2) of section 33-C of the Industrial Disputes Act is of a different nature and wider scope than sub-section (1) of that section so that, application of section 33-C (2) is not confined to cases of award or settlement. In fact, the Industrial Disputes Act in a sense is a parent statute and several legislations in respect of items of remuneration by way of bonus, gratuity are all related to industrial and labour welfare. But it seems to us that it is not intended that, by these, special legislations, the provisions of the Industrial Disputes Act, unles they are inconsistent, are to be excluded from application where they may be applicable.

5. In that background, we have to see whether there is anything in the Payment of Gratuity Act, 1972, which excludes the jurisdiction of the Presiding Officer under section 33-C (2) of the Industrial Disputes Act in a matter as in this case. It is important to remember, as already pointed out, that there was no denial by the employer before him of the entitlement of the employee to gratuity. Although the Gratuity Act provides for a procedure, as we have already noticed, for applying to the employer for gratuity and then the latter being called upon to determine the amount, and in a case of dispute as to the entitlement, the Controller being vested with the jurisdiction to decide it, and where there is no dispute as to the entitlement it is merely a matter of computation of the benefit by way of gratuity, we fail, to see how the jurisdiction under section 33-C (2) of the Industrial Disputes Act is in conflict with any of the provisions of the Gratuity Act or particularly the sphere of enquiry of the employer or the Controller under the provisions of the Act. In our opinion, section 33-C (2) is of a general character and wider application and is not excluded by section 14 of the Gratuity Act, so far as this case is concerned.

6. On that view, the appeal is dismissed. There will be no order as to costs.

S.J. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*T. Ramaprasada Rao and S. Ratnavel Pandian.*

M. C. S. Rajan and Company .. *Appellant**

v.

National Nail Industries, Tiruchirapalli and others .. *Respondents.*

Civil Procedure Code (*V of* 1908), *Order* 6, *rule* 14, *Indian Contract Act* (*IX* of 1872), *sections* 196, 199,—*Suit for recovery of money due—Plaint signed by plaintiff's manager —Objection that suit was not maintainable on this ground —Power of attorney produced at the time of trial—Common law principles apply—Suit held maintainable.*

The plaintiff filed the suit for recovery of money due on accounts. The plaint was verified by the manager of the plaintiff. The power of attorney was not filed at the time of filing the suit but was produced at the time of the trial. The defendant raised an issue that the suit was not maintainable since it was not signed by the plaintiff and the manager had not produced the authority at the time of institution of the suit. On the question of maintainability of the suit,

Held, under Order 6, rules 14 and 15, Civil Procedure Code, the pleading could be signed or verified, as the case may be, by any person duly authorised by the person who has to sign the same. In a case where a manager of a proprietorship-concern signs the pleadings and verifies them as a person who has been duly authorised to sign the same and as one who has been acquainted with the facts of the case, then it is reasonable to say that if at any material point of time and particularly when the defendants raise a specific plea that the peladings had not been properly signed and verified he produces the requisite authority from the sole proprietor or satisfies the Court that

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* Appeal No. 659 of 1971. 3rd *April*, 1975.

he is fully acquainted with the facts of the case, the principle and substance of rules 14 and 15 are satisfied. The case has to be decided on the elementary principles of ratification of an act by a principal. Under sections 196 and 199 of the Indian Contract Act, an act done by one person on behalf of another, but without his knowledge or authority, may be ratified by that other and if that other so elects to ratify the same, effect will follow as if the act was performed by that other. [*Para.* 4.]

The manager had the requisite authority to present the plaint, sign the same and verify the same and if this is accepted on a broad common law principle based on ratification of the act by the principal, then it follows that the suit was maintainable. [*Para.* 5.]

Case referred to :—

Govindoss v. Muthiachetty, 48 M.L.J. 721 : A.I.R. 1925 Mad. 660 ; *Subbiah Pillai* v. *Sankarapandian Pillai*, 61 L.W. 220: (1948) 1 M.L.J. 227 : A.I.R. 1948 Mad. 369 ; *Mohinmohun Das* v. *Bungsi Buddan Saha Das* , (1890) I.L.R. 17 Cal. 580 ; *Maharaja of Rewah* v. *Swami Saran*, (1903) I.L.R. 25 All. 635.

Appeal against the decree of the City Civil Court (III Asst Judge), Madras, dated 27th August, 1970 and passed in O.S. No 6552 of 1968.

N.S. Raghavan, for Appellant.

T.R. Rajagopalan, (Amicus Curiae), for Respondents.

The Judgment of the Court was delivered by

Ramprasada Rao, J.—A very short question arises in this appeal. Plaintiff filed a suit for recovery of money due on accounts. The plaintiff was admittedly a sole proprietary concern of which one Padmanabhan was the sole proprietor. He was trading under the name and style of M.C.S. Rajan & Company. He had a Manager by name Narayanan. The defendants owed on account and dealings a sum of Rs.22,361.83. As per the books of accounts, the amount due was arrived at and the plaintiff claimed interest at 12 per cent. per annum on the outstandings so struck in the accounts. The plaintiffs gave notice Exhibit A-2 prior to the suit and the defendants replied that so much amount was not due as the goods were priced at a very high rate not agreed to specifically between the parties. The plaintiff, therefore, on the basis of his accounts came to Court. While instituting the suit, the cause title was correctly given as M.C.S. Rajan and Company and in paragraph 1 thereto, the Company was described as the sole proprietary concern of Padmanabhan. It was also stated that the suit was being filed by its Manager M.A. Narayanan. Obviously, this was done since the claim will be barred by limitation, if there was any delay in the matter of the filing of the action The plaint was verified by Mr. Narayanan as Manager of the plaintiff-firm. The plaintiff sought for the usual money decree. The plaint was duly numbered without any objection by the Court. The defendants in their written statement after raising several pleas on merits, said that the suit as framed was not maintainable, as it is not made clear as to how the Manager can sue on behalf of the plaintiff's proprietor, Padmanabhan who has not filed the suit in his individual name. As in our view, it is not necessary to consider the merits in the defence as is presently seen, we are not stating the defence in full.

2. The main question and controversy touched upon by the defendants in their defence was that the suit as framed and as presented by Mr. Narayanan as the Manager of the proprietary concern was not maintainable.

The following issues were framed for trial.

(1) What is the agreed price of goods ?

(2) Whether the statement of account of plaintiff is correct ?

(3) Whether the plaintiff is entitled to interest ?

(4) Whether the suit is barred by limitation ?

(5) Whether the suit is not maintainable for the reasons stated in para. 10 of the written statement ?

(6) Whether this Court has no jurisdiction to try this suit ?

(7) To what reliefs, if any, is the plaintiff entitled?

3. On all the issues excepting issue No. 5, the learned trial Judge agreed with the plaintiff. But, on issue No. 5, he was of the view that as the authority which enabled Narayanan to sign the plaint and verify the pleadings was not produced at or about the time when the suit was filed by him, the presentation of the plaint is irregular and the acceptance of the same ought not to have been done and hence, no decree can be passed, even though there is no real defence on the merits of the case. The learned trial Judge was of the view that as Padmanabhan has not signed the plaint and as Narayanan did not produce the power of attorney on the day when he signed the pleading, and as Exhibit A-20, the power of attorney, under which the act of Narayanan was ratified by Padmanabhan was produced late and in particular at the time of trial, the learned trial Judge, while agreeing with the plaintiff on all the other issues, found against it on issue No. 5 and held that the suit was not maintainable. It is as against this portion of the judgment which has, of course, resulted in the dismissal of the suit that the appeal has been filed. In our view, this is a case in which the sole proprietary concern whose proprietor was Padmanabhan and whose name also has been disclosed as such is the plaintiff. One way by which a sole proprietor who has a trading style can file a suit in respect of his commercial activity is by signing the plaint himself as proprietor or causing the same to be signed by a person who has a requisite authority to do so. In the Civil Procedure Code, there is no express bar to this procedure. In fact, Order 30, rule 10 refers to a suit against a person carrying on business in a name other than his own name. But, there is no express provision in the Civil Procedure Code for suits filed by persons carrying on business in a name other than his own. Therefore, the regularity or acceptance of such suits by Courts has to be tested by common law principles. No doubt, to some extent Order 6 dealing with pleadings and in particular Order 6, rules 14 and 15 might give a clue. Under Order 6, rule 14:

> " Every pleading shall be signed by the party and his pleader (if any) : provided that where a party pleading is, by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person duly authorised by him to sign the same or to sue or defend on his behalf."

Order 6, rule 15 reads thus :

> " (1) Save as otherwise provided by any law for the time being in force every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case.
>
> (2) The person verifying shall specify, by reference to the numbered paragraphs of the pleading what he verifies of his own knowledge and what he verifies upon information received and believed to be true.
>
> (3) The verification shall be signed by the person making it and shall state the case on which and the place at which it was signed."

4. Under both the rules, the pleading could be signed or verified as the case may be by any person duly authorised by the person who has to sign the same. In fact, the pleading could be verified by a person proved to the satisfaction of the Court to be acquainted with the facts of the case. The purport of rules 14 and 15 of Order 6 is to avoid impersonation and unauthorised persons ushering in pleadings into Court and cause confusion later on. But in a case where a Manager of a proprietorship concern signs the pleadings and verifies them as a person who has been duly authorised to sign the same and as one who has been acquainted with the facts of the case, then it is reasonable to say that, if at any material point of time and particularly when the defendants raise a specific plea that the pleadings have not been properly signed or verified, he produces the requisite authority from the sole proprietor or satisfies the Court that he is fully acquainted with the facts of the case, the principle and substance of rules 14 and 15 are satisfied. The case has to be decided on the elementary principle of ratification of an act by a principal. That the person who signed the pleadings and verified it is

the Manager of the concern is not in dispute. It can, therefore be safely presumed that he is acquainted with the facts of the case. The question, however, is whether he was authorised to sign the pleadings by the principal namely, the proprietor. Exhibit A-20 is the power of attorney produced during the trial of the case which establishes that Padmanabhan has appointed and constituted Mr. Narayanan to file a suit against the defendants and take all such steps necessary in the said matter. He has also expressly stated that any acts done by its attorney in that behalf shall be ratified and confirmed by him. Probably, this was the main anticpation which prompted the principal administrative officer of the City Civil Court to accept the pleadings and number the suit. Even assming that there was an irregular signing of the pleading and a verification of the same, the power of attorney Exhibits A-20 produced would plug the laches said to have been created in the situation concerned and would make the pleading a perfect one and also the vertification an acceptable one. So long as the principal has ratified an act authorised or unauthorised by him, and if there is no dispute by the contesting defendants that there was no such ratification by the principal, then in our view and in the facts and circumstances of this case, there has been a proper presentation of the plaint by Mr. Narayanan and Exhibit A-20, through supervening in point of time would date back to the date of presentation of the plaint, and would make it a proper presentation of the same by the agent with due authority of the principal. Sections 196 and 199 of the Indian Contract Act make it clear that an act done by one person on behalf of another, but without his knowledge or authority, may be ratified by that other and if that other so elects to ratify, the same, effect will follow as if the act was performed by that other.

5. Even so, section 199 of the Indian Contract Act say that a person ratifying any authorised act done on his behalf ratifies the whole of the transaction of which such act formed a part. Even, as we said if the contention of the defendants is accepted for argument's sake, that there was an irregularity in the transaction when Mr. Narayanan presented the plaint, such an irregularity has been cured by the express ratification of that irregular act by Mr. Padmanabhan and this, as we said, has bridged the gulf, if at all there was one, in the matter of proper presentation of the plaint in the Court below. The learned trial Judge was, therefore, wrong in having dismissed the suit as not being maintainable. The circumstances of the case prompt us to hold that Narayanan had the requisite authority to present the plaint, sign the same and verify the same and if this is accepted on the broad common law principle based on ratification of the act by the principal, then it follows that the suit was maintainable.

6. In fact we entertained slight doubt about the legal position and we requested Mr. T.R. Rajagopal to assist us as *amicus curiae*. Apart from the common law principle referred to above by us, he has brought to our notice certain decisions of our Court and other High Courts. In *Govindoss* v. *Muthiah Chetty*[1], Srinivasa Aiyangar, J. observed as follows:

> " I am not at all sure that with the plaint signed and verified as it was by the person who purported to act as the agent of the plaintiff and the order of the learned Judge or this Court granting leave such leave when granted did not relate back to the institution of the suit and cure any irregularity attaching to the signing or verification of the plaint. "

That was a case were the plaint was presented by a person purporting to act as agent, but without producing the power of attorney. Later, the power was produced and the contention was that the power not having been filed along with the plaint and as the leave to accept the plaint by the administrative officer or the Judge, as the case may be, is a condition precedent and such leave not having been obtained, there was no proper plaint before the Court. The learned Judge did not accept that contention. A Division Bench of our High Court consisting

1. 48 M.L.J. 721: A.I.R. 1925 Mad. 660.

of Chief Justice Gentle and Yahya Ali, J in *Subbiah Pillai* v. *Sankarapandian Pillai*[1], in a smilar situation following the observation of the Judicial Committee in *Mohinimohun Das* v. *Bungst Buddon Saha Das*[2] observed thus :

> " Where plaintiff has not signed a plaint *filed with his knoweldge and consent,* it is an omission which can be cured, and indeed, should be corrected in the interests of justice. The omission to sign or verify a plaint is not such a defect as could affect the merits of a case or the jurisdiction of the Court and is curable under the provisions of section 99, Civil Procedure Code."

The learned Judges have gone to the extent of saysing that :

> " If the defect is not discovered until the case comes on for hearing before an appellate Court, the appellate Court may order the amendment to be made in that Court. The appellate Court ought not to dismiss the suit or interfere with the decree of the lower Court merely because the plaint has not been signed. "

Even the Allahabad High Court dealing with a similar situation, but under the old Act, (reported in *Maharajah of Rewah* v. *Swami Saran and another*[3]) in a case where a plaint was filed in the Revenue Court by a person not properly authorised to sign the same at the time of presentation, but which was cured by subsequent sanction, observed as follows :

> " Where the plaint in a suit filed in a Court of Revenue on behalf of a Ruling Chief was signed by a person who at the time of signing had not been specially appointed by Government for such purpose, under section 432 Civil Procedure Code, but was so appointed before the period of limitation in respect of such suit had expired, the plaint was a valid plaint for all purposes."

Therefore, the finding of the Court below on this point has to be set aide. As all other issues have been found in favour of the appellant and as there is no one appearing for the respondents before us, the appeal is allowed with costs and the plaintiff-appellant would be entitled to the decree as prayed for.

1. (1948) 1 M.L.J. 227 : 61 L.W. 220 : A.I.R. 1948 Mad. 369.
2. (1890) I.L.R. 17 Cal. 580.
3. (1903) I.L.R. 25 All. 635.

7. We are thankful to Mr. T.R. Rajagopal for the assistance he rendered to this Court.

S.J. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*S. Natarajan, J.*

S. V. Ramalingam and others .. *Petitioners**

v.

K.E. Rajagopalan and another .. *Respondents.*

Civil Procedure Code (V of 1908), Order 34, rule 5—Mortgage—Property brought to sale through Court—Sale held—Application by mortgagor to set aside sale—Sale confirmed by Court—Appeal by mortgagor to High Court —Application to High Court under Order 34, rule 5—Whether maintainable.

The suit property was under mortgage and a suit was filed and a preliminary decree and final decree were passed. The property was purchased by the second respondent at the Court sale. The mortgagors filed applications in the executing Court for setting aside the sale. The applications were dismissed and the sale was confirmed and the sale certificate was engrossed on stamp papers. The mortgagors filed an appeal to the HighCourt. Before the appeal was heard, an application under Order 34, rule 5 and section 151, Civil Procedure Code, was filed by the mortgagors for redemption of the mortgage. The second respondent-purchaser objected that the application was belated and in any event, such a petition would not lie after the sale had been confirmed by the lower Court,

Held, the appeal preferred by the judgment-debtors had the effect of rendering the sale and its confirmations fluidal and nebulous. The finality of the sale was rendered at large and as such, the petitioners would be entitled to exercise the right conferred on them under Order 34, rule 5 to redeem the mortgage. [*Para.* 16.]

* C.M.P. No. 8386 of 1974. 17*th October*, 1974.

Cases referred to:—

Madhavan Nainar v. *Parameswara Iyer*, I.L.R. (1948) Mad. 734: 61 L.W. 45: (1948) 1 M.L.J. 68 : A.I R. 1948 Mad. 373; *Valliammal* v. *Subramania Iyer*, (1964) 1 M.L J. 275; *Hukumchand* v. *Banzi Lal*. (1968) 2 S.C.J. 32: (1967) 3 S.C.R. 695: A.I.R. 1968 S.C. 86; *Varadarajan* v. *Venkatapathy Reddy*,(1953) 1 M.L.J. 148: 66 L.W. 13 ; *Chellamma* v. *Ramakrishna Rao*, I.L.R. (1946) Mad. 795: (1946) 1 M.L.J. 17: A.I.R. 1946 Mad. 337 : *Chandramani Saha* v. *Anarjan Bibi*, I.L.R. (1934) 61 Cal.945 (P.C.): A.I.R. 1934 P.C.134 ; *Satyanarayana* v. *Ramamurthi*, (1960) 2 An.W.R. 430 ; *Ramathal* v. *Nagarathinammal*, (1967) 1 M.L.J. 260: 80 L.W. 124; *Rajaraman* v. *Allahabad Bank Ltd.*, A.I.R. 1939 Lah. 79 ; *Priti Rekha* v. *Narain*, A.I.R. 1956 Cal. 510.

Petition praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to permit the Petitioners to pay the balance of the decree amount and redeem the mortgage and direct the decree holder the First Respondent, herein to enter full satisfication on the deposit of decree-holder in A.A.O. No. 175 of 1972 preferred to the High Court against the order of the Court of the Subordinate Judge, Madurai dated 26th October, 1971 and passed in E.A.No. 899 of 1976 in E.P.No. 231 of 1964 in O.S.No.63 of 1963.

K.N. Balasubramaniam, for Petitioner.

T.R. Mani, for 2nd Respondent.

The Court made the following

ORDER.—The petitioners in E.A. No. 899 of 1967 (defendants 1, 6 and 7) in O.S. No.63 of 1963 on the file of the Court of the Subordinate Judge of Madurai are the appellants in the C.M.A. and the petitioners in the C.M.P. The Civil Miscellaneous Petition filed during the pendency of the appeal has raised the controversy whether the mortgagors are entitled to redeem the mortgage subsequent to the confirmation of sale by the executing Court , but before the disposal of the appeal preferred against the validity of the sale.

2. The appeal and the petition have come to be filed in the following circumstances. For the sake of convenience, the parties will be referred to as they are arrayed in the civil miscellaneous petition. On foot of a mortgage dated 7th January, 1961 for Rs. 7,500 executed by the first petitioner and his sons (petitioners 2 and 3 being two of the sons) in favour of the first respondent,the latter obtained a preliminary and a final decree in O.S. No. 63 of 1963 and the hypotheca was brought to sale and it was purchased by the second respondent. The abovesaid mortgage was the third mortgage of the suit property. The second respondent, though the brother of the first respondent, is himself the first mortgagee of the suit property, the said mortgage being an othi dated 3rd November, 1960 for Rs. 63,000. There is also a second and a fourth mortgage of the suit property, but about which detailed mention is not called for in these proceedings. It may, however, be stated that the second mortgage dated 3rd November, 1960, for Rs. 12,000 is in favour of Madurai Cocoa Company, in which the second respondent's son K. Jayaraman is a partner. The fourth mortgage dated 29th November, 1962,is in favour of another son the second respondent by name K. Subramaniam. The preliminary decree passed in O.S. No. 63 of 1963 was for Rs. 11,531-41 P. and it was passed on 31st October, 1963. As already stated the mortgagors did not pay the money decreed under the preliminary decree and hence the final decree was passed on 16th March, 1964. Thereafter, the hypotheca was brought to sale and it appears the mortgagors filed as many as eighteen applications for adjournment of the sale, managing to get adjournments on each occasion by paying sundry amounts, totalling in all to Rs. 7,550. After the nineteenth application for adjournment was dismissed, the hypotheca was sold on 25th July, 1966 for a sum of Rs. 46,000 subject to the prior othi and mortgage, and, as already referred, the second respondent was the successful bidder at the auction.

3. Thereafter, three applications, *viz.*, E.A. No. 895 of 1967, E.A. No. 899 of 1967 and E.A. No. 199 of 1969 were filed under Order 21, rule 90, Civil Procedure Code, for the sale being set aside. Various grounds such as the auction-purchaser being a benamidar for the decree-holder,

the execution proceedings being taken without notice to the fifth defendant despite his having attained majority even on the date of the suit, the absence of proclamation for the sale held on 25th July, 1966 gross under-valuation of the hypotheca in the sale proclamation etc., were set up to assail the sale. The petitions were resisted by the respondents. Ultimately, by a common order dated 26th October, 1971 the learned Subordinate Judge of Madurai, after elaborately considering the contentions of the petitioners in the respective petitions, dismissed all of them holding that the sale had been properly held and was not vitiated by any defect or material irregularity. Thereafter, the sale in favour of the second respondent was confirmed and the sale certificate itself was engrossed on stamp papers. As the second respondent-auction-purchaser was already in possession as othidar of the property, which is a house property in South Masi Street, Madurai, the question of the auction-purchaser taking possession of the property in pursuance of the sale did not arise.

4. Aggrieved by the dismissal of their petition, E.A. No. 899 of 1967, the petitioners preferred C.M.A. No. 175 of 1972 to this Court. When the appeal was about to be taken up for hearing K.N. Balasubramaniam, learned counsel for the petitioners filed C.M.P. No. 8385 of 1974 under Order 34, rule 5 and section 151, Civil Procedure Code, and the petitioners prayed therein that they should be permitted to pay the balance of the decree amount and redeem the mortgage and the first respondent, *viz*., the decree-holder should be called upon to enter full satisfaction on such deposit being made. In the affidavit in support of the petition, the first petitioner averred that inasmuch as an appeal had been preferred against the dismissal of E.A. No. 899 of 1967 the confirmation of the sale made by the executing Court had not become final and consequently, the petitioners were entitled to invoke the right of redemption granted to mortgagors under Order 34 , rule 5 and tender the balance of the decree amount.

5. The second respondent refutes the right of the petitioners to redeem the mortgage after the sale had been confirmed by the lower Court and has raised various objections in a detailed counter filed by him. Therein, the plea taken is that the petition under Order 34, rule 5 is highly belated and, in any event, such a petition would not lie after the sale had been confirmed by the lower Court. It is further contended that after the intervention of a third party auction-purchaser in the execution proceedings, the right of redemption is no longer available to the mortgagors. The other grounds of objection urged in the counter are :

"(1) The petitioners have not paid into Court any amount due to the decree-holder as enjoined under Order 34, rule 5 Civil Procedure Code, and therefore the petition does not satisfy the requirements of the said provision.

(2) There is no offer in the petition for payment of solatium and other amounts due to the auction-purchaser and on that ground also, the petition suffers from an unsurmountable infirmity.

(3) By reason of the Court-auction-sale, the second respondent had deposited into Court Rs. 46,000 and for the period the amount was in Court deposit all along, the second respondent would be entitled to interest exceeding Rs. 23,000 at the rate of 12 per cent. per annum.

(4) The mortgagors are also bound to pay poundage of Rs. 940-50 P. solatium on the purchase-money at 5 per cent. amounting to Rs. 2,300, cost of stamp papers for the sale certificate amounting to Rs. 2,070 and property tax totally to Rs. 13,772 from 1966 onwards, and unless all these amounts were paid tof gether with interest on the aggregate o these amounts at 12 per cent. per annum, the petitioner cannot ask for redemption of the mortgage.

6. Before adverting to the arguments of Mr. K.N. Balasubramaniam, learned counsel for the petitioners and Mr. T.R. Mani, learned counsel for the second respondent, on the principal controversy in the matter, reference may conveniently be made to two preliminary objections raised by Mr. T.R. Mani. The first contention of Mr. Mani

is that payments into Court of all amounts due by the petitioners under sub-rule (1) of rule 4 of Order 34 is a condition precedent before an application under Order 34, rule 5 is entertained, and inasmuch as the petitioners have not deposited the prescribed amount in Court, the petition should be dismissed *in limine*. In support of this contention, reliance is placed on *Madhavan Nainar* v. *Parameswara Iyer*[1], where it has been held that further chance has, no doubt, been given to the mortgagor-judgment-debtor under Order 34, rule 5 for saving his property notwithstanding his previous laches and default in respect of the provisions contained under Order 33, rule 3; Order 21, rule 2; Order 21 rule 66 and Order 21, rule 89 at various stages of the case, but that, if he was to avail himself of the extended privilege, he must comply with the stringent provisions of the said rule. Arguing *contra*, Mr. Balasubramaniam contends that the office will not receive the deposit unless permission is granted by the Court for the deposit being made and therefore, the objection raised by Mr. Mani regarding non-deposit of money should not prevail. The explanation of the petitioners' counsel is a tenable and acceptable one. The petitioners have categorically offered, in the affidavit filed in support of the petition, to deposit the balance of decree money and this clearly shows that, but for the unwillingness of the office to receive the deposit without the orders of Court, the amount would have been deposited by the petitioners in accordance with the terms prescribed under Order 34, rule 5. Hence, the preliminary objection raised by Mr. T.R. Mani cannot be countenanced.

7. The second of the formal objections is that the claim of the petitioners regarding their entitlement to redeem the mortgage should be considered contemporaneously with the civil miscellaneous appeal preferred by them, and should not be gone into without the appeal itself being heard. The contention is also devoid of merit and cannot be sustained. If the appeal were to be heard and a decision rendered on merits, this petition under Order 34, rule 5, Civil Procedure Code, would either become infructuous or unsustainable. If the contention of the petitioners that the sale is vitiated by material irregularity were to be accepted and the appeal allowed, the earlier confirmation of the sale will automatically be rendered nugatory and there would be no necessity to go into the question as to whether the petitioners would be entitled to redeem the mortgage during the pendency of the appeal. If, on the contrary, the appeal were to be dismissed, the earlier confirmation of the sale will receive the affirmation of this Court and thereafter the petitioners will not be entitled to invoke Order 34, rule 5 to their aid to seek redemption of the mortgage. The very purpose of filing this petition will get defeated. In such circumstances, the appropriate and the only stage for examining the claim of the petitioners to redeem the mortgage is before the appeal preferred against the dismissal of E.A. No. 899 of 1967 is heard and disposed of on merits.

8. With regard to the main controversy in the petition, *viz.*, the eligibility of the petitioner's to invoke the provisions contained in Order 34, rule 5, Civil Procedure Code and redeem the mortgage, despite the confirmation of the sale by the executing Court, on account of the pendency of the appeal, the decision of Ramachandra Iyer, C.J., in *Valliammal* v. *Subramania Iyer*[1] seems to provide a complete answer. That was also a case where a mortgagor sought to redeem a mortgage during the pendency of an appeal preferred against the dismissal of his petition under Order 21, rule 90, Civil Procedure Code and the sale, subsequent to the dismissal of the petition, had been confirmed by the lower Court. Ramachandra Iyer, C.J., gave a finding in favour of the mortgagor and held thus :

> "It must be noticed that notwithstanding the fact that the petition for setting aside the sale had been dismissed by the executing Court, the matter was at large before the appellate Court in appeal. It would, therefore, follow that there was no final order of confirmation of sale before the appeal

1. I.L.R. (1948) Mad. 734, 745: 61 L.W. 45: (1948) 1 M.L.J. 68 : A.I.R. 1948 Mad. 373.

1. 1944 1 M.L.J. 275.

was disposed of. It is clear from the terms of Order 34, rule 5, Civil Procedure Code, that so long as the sale had been confirmed it will be open to the mortgagors to deposit the amount due together with the solatium as prescribed therein and avoid the sale."

Mr. Mani would, however, contend that *Valliammal* v. *Subramania Iyer*[1], does not lay down the law on the matter correctly and the matter should, therefore, be referred to a Bench for fresh consideration. Alternatively, he would contend that the decision of the Supreme Court in *Hukkumchand* v. *Banzi Lal*[2], sets out a different ratio and therefore, the rules in *Valliammal* v. *Subramania Iyer*[1], need no longer be adhered to. For a fuller and better appreciation of the ticklish question in the case, it is necessary to make an ambulatary survey of decisions rendered by this Court and other Courts under different circumstances in construing the scope and effect of confirmation of sale by the executing Court *vis-a-vis* applications or appeals preferred by the judgment-debtors under Order 21, rule 90, Civil Procedure Code.

9. Dealing with the case of an auction sale in execution of a mortgage decree followed by an application under Order 21, rule 90, Civil Procedure Code, the Privy Council held, in *Chandramani Shaha* v. *Anarjan Bibi*[3], as follows :

> "Again, take a case in which the Subordinate Judge disallowed the application to set aside the sale there would then be confirmation of the sale by the Subordinate Judge and the sale would become absolute as far as his Court was concerned. If the High Court allowed an appeal and set aside the sale, there would then be no sale, and of course, no confirmation and no absolute sale."

10. In the same case, the Privy Council had to consider the question as to the time from which the three years period provided by the Indian Limitation Act (1908), Schedule I, Article 180 would run for an application under Order 21, rule 95, Civil Procedure Code, by the purchaser for delivery of possession. In rendering its decision, the Board held as follows :

> "In the present case, the High Court dismissed the appeals and on such dismissal, the orders of the Subordinate Judge confirming the sale became effective and the sales became absolute.... The result is that, where there is an appeal from an order of the Subordinate Judge, disallowing the application to set aside the sale, the sale will not become absolute within the meaning of Article 180 of the Limitation Act until the disposal of the appeal, even though the Subordinate Judge, may have confirmed the sale, as he was bound to do when he decided to disallow the abovementioned application."

11. In *Chellamma* v. *Ramakrishna Rao*[1], a Bench of this Court had to go into the question as to whether an appplication under section 19 of Madras Act IV of 1938 to scale down the decree debt would lie during the pendency of an appeal against the order refusing to set aside the sale. Answering the question in the affirmative, the Bench held that during the pendency of the appeal, the validity of the sale was still in question and until that question was finally decided by the order of High Court, the sale could not be said to have become absolute. The Bench went further and held that the appeal in the High Court must be regarded as a continuation of the proceedings of the lower Court to set aside the sale. The next line of cases deal with a situation where a sale of mortgaged property was confirmed by the executing Court after it had earlier dismissed for default a petition under Order 21, rule 90, Civil Procedure Code, and the aggrieved mortgagor had preferred an appeal against the dismissal of his petition for default. In *Varadarajan* v. *Venkatapathy Reddy*[2], this Court held that the effect of restoring the application under Order 21, rule 90 automatically

1. (1964) 1 M.L.J. 275.
2. (1968) 2 S.C.J. 32 : (1967) 3 S.C.R. 695 : A.I.R. 1968 S.C. 86.
3. 67 M.L.J. 79 : 61 I.A. 248 : (1934) I.L.R. 61 Cal. 945 (P.C.) : A.I.R. 1934 P.C. 134.

1. I.L.R. (1946) Mad. 795 : (1946) 1 M.L.J. 17 : A.I.R. 1946 Mad. 337.
2. (1953) 1 M.L.J. 148 : 66 L.W. 13.

operated to vacate or render ineffective the earlier order confirming the sale, under Order 21, rule 92, Civil Procedure Code. This view was arrived at on the reasoning that pendency of on application under Order 21, rule, 90, Civil Procedure Code is a bar to an order of confirmation of sale under Order 21, rule 92 being made or remaining effective, and that the restoration of an application under Order 21, rule 90, dismissed earlier for default, would be tantamount to the application being treated as pending and not disposed of, despite the confirmation of the sale in the interregunum. This view was followed in a later case *Ramathal* v. *Nagarathinammal*[1], and it was held that the restoration of the application under Order 21, rule 90, Civil Procedure Code, automatically operated to vacate or render ineffective the earlier order confirming the sale held in pursuance of the final decree in a mortgage action. The same view has been taken by the Andhra High Court also in *Satyanarayana* v. *Ramamurthi*[2], where the position has been enunciated more expressly after holding that it is only where no application under Order 21, rule 90 or other Rules (Rules 89 and 91) is made within the statutory period, or where such application is made and disallowed, that the Court has power to confirm the sale and that the existence of an application for setting aside a sale would be a bar to make the sale absolute. The Bench went further and held that during the pendency of the appeal, no finality attaches to the sale notwithstanding the confirmation of the sale by the trial Court.

12. From the cases referred to above it, is clearly seen that a stage of final irrevocability is not reached even after the executing Court confirms the sale of immovable property to an auction-purchaser either on account of applications not being preferred under rule 89, 90 or 91 of Order 21, Civil Procedure Code, or such applications having been made and disallowed as envisaged under Order 21, rule 92.

13. Mr. Mani would, however, contend that the situation in the present case ought not to be confused with the situation that existed in *Varadarajan* v. *Venkatapathy Reddy*[1], *Ramathal* v. *Nagarathinammal*[2], and *Satyanarayana* v. *Ramamurthi*[3]. The argument in all those cases deal with a situation where applications under Order 21, rule 90 had been dismissed for default, but had been subsequently restored to file by the appellate Court and such restoration had automatically the effect of making the earlier confirmation of sale abortive on the ground that there can be no confirmation when the validity of the sale itself was challenged and a rendering of decision thereon was imperative. The distinction projected in so far as the instant case is concerned is that the petition under Order 21, rule 90, had been validly dismissed by the executing Court on merits, and thereafter the sale had been confirmed, and neither the preferment of the appeal nor the allowance thereof would have the effect of putting the clock back in so far as the petition under Order 21, rule 90 is concerned. Reliance is placed on various factors to highlight the difference between the restoration to file of a petition under Order 21, rule 90 dismissed for default and the preferment of an appeal against the dismissal on merits of such a petition. It is, first of all, pointed out that Order 41, rule 5, Civil Procedure Code, clearly sets out that the mere preferment of an appeal shall not operate as a stay of proceeding under a decree or order appealed against, except so far as the appellate Court may order, and execution of decree shall not also be stayed by reason only of an appeal having been preferred. It is nextly pointed out that there is no provision in the Civil Procedure Code which automatically renders ineffective the confirmation of a sale by reason of an appeal being preferred against the dismissal of a petition under Order 21, rule 90, Civil Procedure Code. Stress is also laid on the fact that when once a hypotheca is sold in Court auction and the sale is confirmed, the right of redemption available to the mortgagor gets extinguished unconditionally. The argument of Mr. Mani is that once the

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1. (1967) 1 M.L.J. 260 : 80 L.W. 124.
2. (1960) 2 An.W.R. 430.

1. (1953) 1 M.L.J. 148 : 66 L.W. 13.
2. (1967) 1 M.L.J. 260 : 80 L.W. 124.
3. (1960) 2 An.W.R. 430.

mortgagor fails to exercise his right under Order 34, rule 5 to pay the requisite amount and redeem the mortgage before the confirmation of the sale and thereafter the sale itself is confirmed, the mortgagor loses his right of redemption for ever unless he succeeds in getting the sale itself set aside by the appellate Court on ground of fraud, material irregularity etc., in the conduct of the sale.

14. In support of his contentions, Mr. Mani places reliance on the following rulings. A proposition is laid down in *Rajaraman* v. *Allahabad Bank Ltd.*[1], that, although a suit does not terminate till the passing of a decree, the passing of a preliminary decree does fix the rights of the parties to a certain extent and thus alters their position materially. This reasoning is invoked to contend analogously that even if it were to be held that the confirmation of a sale by the executing Court was subject to further scrutiny in the appeal preferred by the judgment-debtor, the rights of parties get fixed materially and consequently, the right of redemption which was available to the mortgagor prior to the confirmation of the sale would cease to exist after the confirmation of the sale. The following pronouncement occurring in *Priti Rekha* v. *Narain*[2], is also pressed into service:

> " Reading, therefore, Order 21, rule 92 with Order 34, rule 5, Civil Procedure Code. I am of opinion that the mortgagor can invoke his equity of redemption any time before the Court makes an order confirming the sale and until the sale becomes 'absolute' thereunder."

Lastly, the learned counsel leans heavily upon the following view expressed by the Supreme Court in *Hukkum Chand* v. *Banzi Lal*[3] at pages 88 and 89 of the report :—

> " It may be noted that there is no power under Order 34, rule 5 to extend time and all that it does is to permit the mortgagor-judgment-debtor to deposit the amount before confirmation of sale. It does not give any right to the mortgagor-judgment debtor to ask for postponement of confirmation of sale nor to enable him to deposit the amount.
>
> We have to interpret Order 34, rule 5 and Order 21, rule 92 harmoniously and on a harmonious interpretation of the two provisions, it is clear that though the mortgagor has the right to deposit the amount due at any time before confirmation of sale, there is no question of his being granted time under Order 34, rule 5 and if the provisions of Order 21, rule 92 (1) applied, the sale must be confirmed unless, before the confirmation, the mortgagor-judgment-debtor has deposited the amount as permitted by Order 34, rule 5 (Page 88)...... The judgment-debtor — mortgagor had the right to deposit the amount at any time before confirmation of sale within thirty days after the sale or even more than thirty days after the sale under Order 34, rule 5 (1), so long as the sale was not confirmed. If the amount had been deposited before the confirmation of sale, the judgment-debtors had the right to ask for an order in terms of Order 34, rule 5 (1) in their favour (Page 89)."

15. A conspectus of the entire matter brings to the surface certain distinct features in the sale and confirmation thereof, of mortgaged property and the right made available to the mortgagor to redeem the mortgage after the passing of the final decree and even after the sale of the property in terms of the final decree. Order 34, rule 2, Civil Procedure Code, provides for the passing of a preliminary decree in a foreclosure suit, and acting thereunder, the Court has not only to take account due to the plaintiff-mortgagee at the date of the decree, but has also to give the mortgagor time extending upto six months for payment of the money due to the plaintiff on taking of accounts. Sub-clause (2) of rule 2 of Order 34 gives the option to the Court, on good cause being shown, to extend, from time to time, the time fixed for payment of the amount adjudged due. And then comes Order 34, rule 4, which deals with the preliminary decree to be passed in a suit for sale. Lastly, there is Order 34, rule 5,

1. A.I.R. 1939 Lah. 79.
2. A.I.R. 1956 Cal. 510.
3. (1967) 3 S.C.R. 695: (1968) 2 S.C.J. 32 : A.I.R. 1968 S.C. 86.

which states that if the mortgagor, on or before the day fixed or at any time before the confirmation of sale made in pursuance of a final decree makes payment into Court of all amounts due from him, the Court shall allow redemption. The only condition that is enjoined under sub-rule (2) is that, if the mortgaged property or part thereof had been sold, the mortgagor would not be entitled to redemption unless he also deposits into Court, for payment to the purchaser, a sum equal to five per cent of the purchase money paid into Court by the purchaser. Such facility is obviously afforded to the mortgagor, because the general principle of law is that there should be no clog on the equity of redemption until the sale is concluded finally by Court's order of confirmation or as stated, under Order 21, rule 92, of the sale becoming absolute. Examining the case on hand, I am unable to see what difference there can be in so far as it affects the merits of the case, in the position resulting from an application under Order 21, rule 90, being restored to file for enquiry on the one hand and an appeal being preferred against an order of dismissal on merits of a petition under Order 21, rule 90, Civil Procedure Code. The sustainment of a petition under Order 21, rule 90 and the allowance of an appeal preferred against the dismissal of such a petition will both have the same effect, *viz.*, of rendering the sale invalid. Though the two situations may arise at different times, *viz.* the one preceding the confirmation of the sale and the other succeeding an order of confirmation, the resultant effect in the allowance of the petition or the appeal would, undoubtedly, be the setting at naught of the Court sale of the hypotheca. I do not, therefore, agree with the contention of Mr. Mani that the ratio in *Varadarajan* v. *Venkatapathy Reddy*[1], *Ramathal* v. *Nagarathinammal*[2], and *Satyanarayana* v. *Ramamurthy*[3], will have no application to the facts of the instant case.

16. The confirmation of a sale subsequent to the dismissal of a petition under Order 21, rule 90 cannot, in reality, after the situation when the mortgagor-judgment-debtor has preferred within time an appeal against the dismissal of his petition under Order 21, rule 90. Though the confirmation of the sale does take the auction-purchaser a step further than before the confirmation of the sale, the confirmation, by itself, is in one sense, inchoate. The confirmation gives the sale only vaibility but does not render the sale an indefeasible one, till such time as the appeal preferred by the mortgagor against the validity of the sale remains undisposed. In that sense, the confirmation effected by the executing Court may become final as far as the executing Court is concerned, but it certainly does not stamp the transaction with irrevocable finality when alone the rights of parties get crystallised beyond retracement. Consequently, the appeal preferred by the judgment-debtor has the effect of rendering a sale and its confirmation fluidal and nebulous. It, therefore, follows that the finality of the sale is rendered at large before the appellate Court in appeal and as such, the petitioners will be entitled to exercise the right conferred on them under Order 34, rule 5 to redeem the mortgage.

17. The authorities relied on by Mr. Mani do not lend support to the case of the second respondent. The fixation of rights of parties, consequent on the passing of a preliminary decree, referred to in *Rajaraman* v. *Allahabad Bank Limited*[1] has no reference to the instant case. By reason of the sale held in terms of the final decree and even the confirmation of the sale thereafter, the mortgagor does not lose his right to canvass the validity of the sale before the appellate Court and, as long as that right subsists, the rights of the parties cannot be said to have become fixed unalterably. With reference to *Priti Rekha* v. *Narain*[2], the decision itself makes reference to the statutory right of the mortgagor to invoke his equity of redemption at any time before the sale is confirmed and the sale becomes absolute thereunder. The confirmation of the sale being irretrievably linked with the validity of the sale, the confirmation

1. (1953) 1 M.L.J. 148: 66 L.W. 13.
2. (1967) 1 M.L.J. 260: 80 L.W. 124.
3. (1960) 2 A.W.R. 430.

1. A.I.R. 1939 Lah. 79.
2. A.I.R. 1956 Cal. 510.

is nothing more than a contingent one till the validity of the sale is finally upheld by the appellate Court and, consequently, such confirmation cannot seal the fate of the mortgagor in so far as the equity of redemption in his favour in concerned The decision in *Hukkum Chand* v. *Banzi Lal*[1], on which considerable reliance is placed by Mr. Mani, was rendered under circumstances totally different from those existing in the instant case. The mortgagor therein did indeed file a petition under Order 21, rule 90, Civil Procedure Code but subsequently, by agreement with the decree-holder Society, withdrew the application and fixed a certain time limit for payment of the mortgage money as envisaged under Order 34, rule 5. When default was committed in payment of money within the stipulated time and when further time for deposit was asked for, the Court had to naturally hold that time-limit for deposit was arrived at by consent of parties and therefore the Court had no power to extend the time. That was a situation where the attack on the sale, under Order 21, rule 90 was given up and therefore, the confirmation of the sale had become an irrevocable one. Such is not the case here, since the validity of the sale is itself as large in the appeal and consequently, the confirmation not having attained the state of absoluteness.

18 Mr. Mani would then contend that if Order 34, rule 5, is to be construed in this manner it would not only place third party auction-purchasers at a great disadvantage, in that they are made to wait for an endless period of time in a state of indefiniteness, but at the same time it would be conferring on erring and lax judgment-debtors an underserved right to exercise their right of redemption at a belated stage of the case.

19. The further argument of Mr. Mani is that an intractable and contumacious judgment-debtor, having failed to exercise his right under Order 34, rule 5 before the sale is confirmed by the executing Court, ought not to be allowed to resort to such a right merely because he had preferred an appeal against the dismissal of a petition under Order 21, rule 90 and when the contentions raised in the appeal are worthless and devoid of merit. It is,no doubt, true that by recognising the right of the mortgagor-judgment-debtor to exercise his right of redemption even after the confirmation of the sale by the executing court on the basis of the appeal filed by him rendering at large the confirmation of the sale, the auction-purchaser is kept in a state of uncertainty for a considerable length of time and is put to hardship, but, nevertheless, the argument of Mr. Mani contains a fallacy. Order 34, rule 5 provides, the mortgagor has a right to redeem the mortgage till the validity of the sale is finally upheld and as long as that right exists, the mortgagor cannot be denied opportunity to exercise that right. Whether he exercises the right at the earliest opportunity or makes bold to exercise the right at a belated stage of the case, the right continues to subsist and does not get extinguished merely by reason of non-exercise of rights at a particular stage of the matter.

20. Mr. Mani would, lastly, contend that the mortgagor ought not to be allowed to get away with the matter by merely depositing the amount mentioned in the decree as well as a sum equal to five per cent of the amount of the purchase money, without paying further amounts incurred or lost by the auction purchaser by reason of his purchase of the hypotheca in court sale. In support of this argument Mr. Mani points out that the sum of Rs. 46,000 deposited by the second respondent towards sale price has been lying in Court deposit for nearly eight years without any interest therefor, that the second respondent has incurred expenditure for purchase of stamp papers for the sale certificate being engrossed and has also paid property tax and, unless all these amounts are also paid, the mortgagors should not be allowed to exercise their right under Order 34, rule 5. These factors cannot alter the situation in any manner A similar argument was raised in *Ramathal* v. *Nagarathinammal*[1], and the claim

1. (1968) 2 S.C.J. 32 : (1967) 3 S.C.R. 695 : A.I.R. 1968 S.C. 86.

1. (1967) 1 M.L.J. 260: 80 L.W. 124.

therein was for reimbursement of value of improvements effected by the auction-purchaser. The Bench deciding the matter, held, that such questions had to be agitated and adjudicated in independent proceedings. The same view would prevail in so far as the second respondent's claim for reimbursement of expenses incurred or moneys lost by him is concerned. He will have to work out his rights in respect of the abovesaid claims in independent proceedings against the mortgagor.

21. In the result, the contention of the petitioners is upheld and following the ratio in *Valliammal* v. *Subramania Iyer*[1]; they are permitted to redeem the mortgage by payment of the balance of the decree amount and five per cent of the purchase money representing the solatium to be paid to the second respondent. The petitioners are, therefore given time till 31st October, 1974 to deposit in this Court the abovesaid amounts. If the petitioners fail to deposit the said amounts this petition will stand dismissed and the civil miscellaneous appeal will be taken up for hearing on 1st November, 1974 and disposed of on merits. There will be no order as to costs in this petition.

S.J. ——— *Petition allowed.*

[END OF VOLUME (1975) II M.L.J. (REPORTS).]

1. (1964) 1 M.L.J. 275